MUNICIPAL CORPORATIONS AND THE POLICE POWER IN OHIO

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The author examines in detail the variety of approaches to judicial supervision of the coexistence of state and municipal power, and concludes that careful analysis by the courts and a spirit of accommodation among legislators and administrators are essential to achieving necessary statewide uniformity while preserving the flexibility implicit in municipal Home Rule.

It is now nearly two generations since reform enthusiasts gave great impetus to a movement for local government autonomy which became known as Home Rule. In the interim a great variety of changes have occurred in the American scene which have had or will have direct effect upon both state and local government. To mention but two, the role of the federal government has expanded enormously in the governmental power structure, and the phenomenon of megalopolis has made its appearance. Consequently, it seems increasingly more advisable that studies be kept up-to-date to determine whether the state-municipal structure, created so hopefully by early reformers, is standing the test of time. We need to know whether it still serves municipal needs for autonomy and, perhaps more importantly now, whether it permits the State to perform its function of solving problems which are more and more found not to fit neatly into the territorial packages of municipal corporations. This article is limited to the development of the law in Ohio concerning only one aspect of this complex subject: the division of authority in the use of the police power.

I. SOURCE AND SCOPE OF MUNICIPAL POLICE POWER

For over one hundred years, the broad expanse of governmental power in Ohio was vested in the State. Subordinate political subdivisions gained authority by delegation from the legislature.[1] Even then, in the case of municipal corporations the famous Dillon Rule of strict construction was uniformly applied.[2] But in 1912 the Ohio Constitutional Convention enacted Home Rule for Ohio municipali-

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[1] Collins v. Hatch, 18 Ohio 523 (1849); Ravenna v. Pennsylvania Co., 45 Ohio St. 118 (1887). *See* Perillo, *Peace-and-Order Power of an Ohio Municipal Corporation*, 3 CLEV.-MAR. L. REV. 45 (1954).

[2] *E.g.*, Bloom v. Xenia, 32 Ohio St. 461 (1877).

ties with the accompanying loss by the State of its monopoly of power.[3]

The supreme court early referred to the amendment in the following language:

> The manifest purpose of the amendment in 1912 was to . . . add to the governmental status of the municipalities. The people made a new distribution of governmental power. The charter of a city . . . finds its validity and its vitality in the constitution itself and not in the enactments of the general assembly.[4]

In other words, since 1912 Ohio municipalities need not look to the legislature for enabling legislation in order for them to exercise powers of government within their territorial limits,[5] since these powers have been granted to all municipal corporations[6] through this constitutional provision.[7] Except for occasional oversights,[8] experience since 1912 has confirmed that this first of the primary purposes for the adoption of Home Rule has been achieved in Ohio. With it has come as a necessary corollary a diminution of state control over municipal corporations.

This grant of municipal power includes both powers of local self-government and the power to make "local police regulations."

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[3] OHIO CONST. art. XVII, §§ 1-3, 7. The principal provisions of Home Rule authority are contained in § 3:

> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary, and other similar regulations as are not in conflict with general laws.

[4] Billings v. Cleveland Ry., 92 Ohio St. 478, 483, 111 N.E. 155, 156 (1915).

[5] Beachwood v. Bd. of Elections, 167 Ohio St. 369, 148 N.E.2d 921 (1958); State *ex rel.* Hanna v. Spitler, 47 Ohio App. 114, 190 N.E. 584 (1933).

[6] Perrysburg v. Ridgeway, 108 Ohio St. 245, 140 N.E. 595 (1923); Akron v. Scalera, 135 Ohio St. 65, 19 N.E.2d 279 (1939); Perrysburg v. Ridgeway, 108 Ohio St. 245, 140 N.E. 595 (1923). This authority was at first limited to charter municipalities. State *ex rel.* Toledo v. Lynch, 88 Ohio St. 71, 102 N.E. 670 (1913), *impliedly overruled,* Youngstown v. Arnold, 15 Ohio App. 112 (1921), *disapproved of,* Perrysburg v. Ridgeway, *supra.*

[7] West Jefferson v. Robinson, 1 Ohio St. 2d 113, 205 N.E.2d 382 (1965); Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519 (1923); Rowland v. State, 104 Ohio St. 366, 135 N.E. 622 (1922); Froelich v. Cleveland, 99 Ohio St. 376, 124 N.E. 212 (1919).

[8] Early transitional cases: Hughes v. Cincinnati, 14 Ohio N.P. (n.s.) 494 (C. P. (1913); *In re* Smith, 14 Ohio N.P. (n.s.) 497 (C.P. 1913); *In re* Sherlock, 19 Ohio N.P. (n.s.) 302 (C.P. 1916); Morris v. Conneaut, 20 Ohio N.P. (n.s.) 289 (C.P. 1917); Magris v. Canton, 22 Ohio N.P. (n.s.) 312 (C.P. 1919). Even the supreme court found power in statutory provisions although it rested its decision on constitutional authority. Greenburg v. Cleveland, 98 Ohio St. 282, 120 N.E. 829 (1918).

Any careful distinction between these two areas of municipal concern is beyond the scope of this article. In general though, matters of wholly internal interest not affecting citizens outside of the municipality,[9] such as the structure of government, the definition of powers and duties of different departments, and the method and manner of selecting public officials, are matters of local self-government.[10]

On the other hand, general laws are such as

> relate to police, sanitary and other similar regulations, and which apply uniformly throughout the state. They involve the concern of the state for the peace, health and safety of all of its people, wholly separate and distinct from, and without reference to, any of its political subdivisions — such as regulate the morals of the people, the purity of their food, the protection of the streams, the safety of buildings and similar matters.[11]

It is to this flexible line of distinction between internal functions and police power that Ohio courts have been most firmly committed through the years,[12] despite occasional strains[13] and early misgivings.[14]

Within the constitutional term "police regulations," munici-

Later examples: Union Sand & Supply Corp. v. Fairport, 172 Ohio St. 387, 176 N.E.2d 224 (1961) (statute "fortified" constitutional power); Pritz v. Messer, 112 Ohio St. 628, 149 N.E. 30 (1925) (statutory and constitutional provisions caused municipalities to be "doubly empowered . . . to enact zoning ordinances"); Leet v. Eastlake, 7 Ohio App. 2d 218, 220 N.E.2d 121 (1966); Ermekeil v. State, 8 Ohio L. Abs. 121 (Ct. App. 1930); Zelles v. Matowitz, 22 Ohio Op. 261 (Cleveland Mun. Ct. 1941), *appeal dismissed*, 139 Ohio St. 627, 41 N.E.2d 708 (1942).

In a series of cases extending from a 1921 supreme court case to a very recent appeals court ruling, courts have referred to OHIO GEN. CODE § 3781 (1938) and its successor, OHIO REV. CODE ANN. § 723.48 (Page 1953), as constituting adequate authority to sustain municipal ordinances which regulated the speed of trains within corporate limits. *See* Blancke v. New York Cent. R.R., 103 Ohio St. 178, 133 N.E. 484 (1921); Bender v. New York Cent. R.R., 3 Ohio App. 2d 150, 209 N.E.2d 589 (1963).

[9] State *ex rel.* Arey v. Sherrill, 142 Ohio St. 574, 53 N.E.2d 501 (1944); Moore v. Evans, 12 Ohio L. Abs. 531 (Ct. App. 1932).

[10] Fitzgerald v. Cleveland, 88 Ohio St. 338, 103 N.E. 512 (1913).

[11] *Id.* at 359, 103 N.E. at 517. *See* Silvey v. Montgomery County, 273 F. 202 (S.D. Ohio 1921); State *ex rel.* Giovanello v. Lowellville, 139 Ohio St. 219, 39 N.E.2d 527 (1942); Froelich v. Cleveland, 99 Ohio St. 376, 124 N.E. 212 (1919).

[12] Cleveland Tel. Co. v. Cleveland, 98 Ohio St. 358, 121 N.E. 701 (1918).

[13] *E.g.*, Union Sand & Supply Corp. v. Fairport, 172 Ohio St. 387, 176 N.E.2d 224 (1961), *noted in* 23 OHIO ST. L. J. 557 (1962); State *ex rel.* Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (1958).

[14] *E.g.*, Froelich v. Cleveland, 99 Ohio St. 376, 124 N.E. 212 (1919).

pal police power is, within the territorial limits of the muncipality,[15] as broad as that of the State.[16] Municipal police regulations, however, must be reasonable,[17] both to come properly within the municipal power and to conform to due process and equal protection requirements of the federal and state constitutions.[18] The objectives sought must be within the police power. The means adopted must be suitable to those ends (that is, they must have a real and substantial relationship to their purpose[19]) they must be impartially applied; and they may not be unduly oppressive to the individual nor interfere with private rights beyond the necessities of the situation.[20]

Municipal police power some years ago temporarily received a strained interpretation as it related to the prohibition rather than the regulation of activities. The only difference between these two is a matter of degree and not of kind. A prohibition might be as reasonable under certain circumstances as a regulation would be under others. Although this approach had been suggested in several cases,[21] some courts developed further restrictions.[22] Finally, one

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[15] Silvey v. Montgomery County, 273 F. 202 (S. D. Ohio 1921); Benjamin v. Columbus, 167 Ohio St. 103, 146 N.E.2d 854 (1967), *cert. denied*, 357 U.S. 904 (1958).

[16] Benjamin v. Columbus, 167 Ohio St. 103, 146 N.E.2d 854 (1957); Cleveland Tel. Co. v. Cleveland, 98 Ohio St. 358, 121 N.E. 701 (1918). Examples of judicially approved municipal use of the police power: Lindsay v. Cincinnati, 172 Ohio St. 137, 174 N.E.2d 96 (1961) (make seizure and forfeiture of property used without knowledge of owner to violate an ordinance part of the penalty); Dayton v. Miller, 154 Ohio St. 500, 96 N.E.2d 780 (1951), *noted in* 13 OHIO ST. L. J. 111 (1952) (right to create a misdemeanor of activity already an offense against the state); Welch v. Cleveland, 97 Ohio St. 311, 120 N.E. 206 (1917) (provides for punishment of a "suspicious person"). For examples of the municipal regulation of business, *see generally*, Note, 15 W. RES. L. REV. 195 (1963).

[17] Froelich v. Cleveland, 99 Ohio St. 376, 124 N.E. 212 (1919); Cleveland Elec. Illuminating Co. v. Painesville, 10 Ohio App. 2d 85, 226 N.E.2d 145 (1967).

[18] OHIO CONST. art. I, §§ 1, 19; U. S. CONST., Amend. 14.

[19] Leet v. Eastlake, 7 Ohio App. 2d 218, 220 N.E.2d 121 (1966).

[20] Froelich v. Cleveland, 99 Ohio St. 376, 124 N.E. 212 (1919). In Columbus v. Miqdadi, 25 Ohio Op.2d 337, 195 N.E.2d 923 (Columbus Mun. Ct. 1963), licensing of the sale of goods manufactured in communist countries when applied to books and papers was found to be arbitrary since no standards limited it to police power objectives. In Myers v. Defiance, 67 Ohio App. 159, 36 N.E.2d 162 (1940), the requirement of a bond from owners of laundries with plants outside the city conditioned upon the safe return of a customer's clothes was found discriminatory when no similar requirement was made of local businesses.

[21] Frecker v. Dayton, 153 Ohio St. 14, 21, 90 N.E.2d 851, 854 (1950) (dissenting opinion of Taft, J.); Columbus v. Miqdadi, 25 Ohio Op. 2d 337, 195 N.E.2d 923 (Columbus Mun. Ct. 1963); Frecker v. Zanesville, 35 Ohio Op. 234, 72 N.E.2d 477 (C. P. 1946).

appeals court reached the conclusion that the power to prohibit was not vested in municipal corporations unless the business was inherently evil, because section 3, article XVIII speaks only of police "regulations", not of "prohibitions."[23] This theory seems insupportable both as an interpretation of the language of the Home Rule Amendment and in light of precedent.[24] Even so, the decision was affirmed by the supreme court but apparently on the ground that the ordinance was discriminatory.[25] Only a few years later the supreme court sought to clarify the situation.[26] Although it found that municipal corporations had been granted power to prohibit, the court did not rest its decision on the ground that police "regulations" were broad enough to include "prohibition." Rather, it moved the source of municipal power entirely away from this possibly restrictive term by finding that all Home Rule power was derived from the first clause of the amendment, that dealing with local self-government. The second clause, that dealing with police regulations not in conflict with general laws, was deemed not a grant but only a limitation upon the power previously granted. The municipal power to prohibit has since been reaffirmed by the court in sustaining a "Green River" ordinance.[27] This decision should finally lay the earlier theory to rest.

If not precluded from making prohibitions, municipalities must nonetheless abide by the constitutionally imposed limitation that police regulations must not be "in conflict with general laws." This limitation has been construed to apply only to police regulations, not to municipal exercise of power over matters of local self-government.[28] This means that although the first Home Rule goal—freeing the municipalities from the necessity of seeking enabling acts from the legislature—has been achieved, the second objective—freeing them from state supervision over the exercise of their powers—has been only partially established in Ohio. Only in the area of local self-government is a municipality, and by recent decisions only charter

[22] *E.g.*, Central Outdoor Advertising Co. v. Evendale, 54 Ohio Op. 354, 124 N.E.2d 189 (C.P. 1954); Washington v. Thompson, 80 Ohio L. Abs. 598, 160 N.E.2d 568 (C.P. 1949); Schul v. King, 35 Ohio Op. 238, 70 N.E.2d 378 (C.P. 1946).

[23] Frecker v. Dayton, 88 Ohio App. 52, 85 N.E.2d 419 (1949), *aff'd*, 153 Ohio St. 14, 90 N.E.2d 851 (1950).

[24] *See* Frecker v. Dayton, 153 Ohio St. 14, 23, 90 N.E.2d 851, 855 (1950) (dissenting opinion).

[25] *Id.*

[26] Benjamin v. Columbus, 167 Ohio St. 103, 146 N.E.2d 854 (1957).

[27] West Jefferson v. Robinson, 1 Ohio St. 2d 113, 205 N.E.2d 382 (1965).

[28] Fitzgerald v. Cleveland, 88 Ohio St. 338, 103 N.E. 512 (1913).

municipalities,[29] supreme over state authority. For police regulations, the state can exercise supervisory authority through the enactment of general laws which have the effect of abrogating conflicting municipal ordinances. In addition, there remain areas in which the state retains exclusive authority, such as over "state matters"[30] or over areas where a municipality has only subordinate concern.[31] Into this power structure a series of court decisions must be fitted in which health and police and fire department matters have been termed as being of "statewide concern."[32] These decisions can

[29] Leavers v. Canton, 1 Ohio St. 2d 33, 203 N.E.2d 354 (1964); State *ex rel.* Petit v. Wagner, 170 Ohio St. 297, 164 N.E.2d 574 (1960). The court's conclusion in these cases that, absent a charter, an ordinance is invalid if at "variance" with state law raises the question of whether the same approach will be followed in establishing a variance as has been followed in finding an ordinance to be in "conflict with general laws" in the field of police regulations. There is as yet no reason to think that it will not be. For an excellent resumé of the development of this new concept in Ohio municipal law, *see* Duffey, *Non-Charter Municipalities: Local Self-Government,* 21 OHIO ST. L.J. 304 (1960).

[30] State *ex rel.* Gordon v. Rhodes, 156 Ohio St. 81, 100 N.E.2d 225 (1951); State *ex rel.* Ramey v. Davis, 119 Ohio St. 596, 165 N.E. 298 (1929); Niehaus v. State *ex rel.* Bd. of Educ. 111 Ohio St. 47, 144 N.E. 433 (1924).

[31] *E.g.,* in the creation of courts. State *ex rel.* Cherrington v. Hutsinpiller, 112 Ohio St. 468, 147 N.E. 647 (1925). Municipal efforts to make civil service board decisions final have been interpreted as denying common pleas courts' jurisdiction established by statute and therefore ineffective. Cupps v. Toledo, 170 Ohio St. 144, 163 N.E.2d 384 (1959); *In re* Fortune, 138 Ohio St. 385, 35 N.E.2d 442 (1941); Klucar v. Hull, 82 Ohio L. Abs. 305, 165 N.E.2d 246 (C. P. 1959). *Contra,* Penrod v. Woehler, 18 Ohio L. Abs. 135, (Ct. App. 1934); Ferguson v. Collins, 16 Ohio L. Abs. 6 (Ct. App. 1933), *appeal dismissed,* 127 Ohio St. 419, 189 N.E. 4 (1933) (both on the basis that civil service is a matter of local self-government free from state control). On administrative management of courts, *see* State *ex rel.* Ramey v. Davis, 119 Ohio St. 596, 165 N.E. 298 (1929); Underwood v. Isham, 61 Ohio App. 129, 22 N.E.2d 468, *appeal dismissed,* 135 Ohio St. 320, 20 N.E.2d 719 (1939). In the latter case the court confusingly talked of invalidity because of state preemption and conflict with state laws rather than finding exclusive state power. *See* Hitchcock, *Ohio Ordinances in Conflict with General Laws,* 16 U. CIN. L. REV. 1, 4 (1942); Fordham & Asher, *Home Rule Powers in Theory and Practice,* 9 OHIO ST. L.J. 18, 40 (1948). *See also,* Lakewood v. Thormyer, 171 Ohio St. 135, 168 N.E.2d 289 (1960) (highway construction); Beachwood v. Bd. of Elections, 167 Ohio St. 369, 148 N.E.2d 921 (1958) (detachment); State *ex rel.* Ohio Turnpike Comm'n v. Allen, 158 Ohio St. 168, 107 N.E.2d 345, *cert. denied,* 344 U.S. 865 (1952) (highway construction); Niehaus v. State *ex rel.* Bd. of Educ., 111 Ohio St. 47, 144 N.E. 433 (1924) (education); Schultz v. Upper Arlington, 88 Ohio App. 281, 97 N.E.2d 218 (1950) (annexation).

[32] Cincinnati v. Gamble, 138 Ohio St. 220, 34 N.E.2d 226 (1941) (police and fire), *overruled as to "statewide concern",* State *ex rel.* Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (1958); Bucyrus v. State Dep't of Health, 120 Ohio St. 426, 166 N.E. 370 (1929) (health).

be interpreted as establishing these areas as ones of exclusive state control.[33] But this has never been directly held, nor have municipalities ceased to evidence regular and active interest in them. The use of the "statewide concern" designation has become much less frequent, and the decisions in which it has been used show more the court's concern over the recognition of state power than a desire to establish it as exclusive.[34] This has been exemplified particularly in the police and fire department cases by the characterization of state power as superior to that of the municipality. Therefore, a matter of "statewide concern" appears to fit more comfortably within the category of police regulations than within either that of exclusive state power or of local self-government.[35]

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[33] Fordham & Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L. J. 18, 31-42 (1948).

[34] *See* Bucyrus v. State Dep't of Health, 120 Ohio St. 426, 166 N.E. 370 (1929); State *ex rel.* Cuyahoga Heights v. Zangerle, 103 Ohio St. 566, 134 N.E. 686 (1921); Hickey v. Burke, 78 Ohio App. 351, 69 N.E.2d 33, *appeal dismissed*, 147 Ohio St. 217, 70 N.E.2d 274 (1946). At times language unnecessary to the establishment of state power has been used but it has been directed more toward withdrawal or preemption of municipal authority than to exclusive state power. This has also been true in cases involving the establishment by the State of health districts independent of municipal corporations. State *ex rel.* Mowrer v. Underwood, 137 Ohio St. 1, 27 N.E.2d 773 (1940); Bd. of Health v. State *ex rel.* O'Wesney, 40 Ohio App. 77, 178 N.E. 215 (1931).

[35] While a trial court in Ferrie v. Sweeney, 34 Ohio Op. 272, 72 N.E.2d 128 (C.P. 1946), spoke of conflict, the doctrine of preemption and the fact that money was not being spent for a public purpose were probably necessary for it to reach the result it did. A true conflict might be said to be the basis for the decision in Hecker v. State *ex rel.* Cleveland, 111 Ohio St. 168, 144 N.E. 700 (1924).

Judge Williams in his concurring opinion to the police department case of State *ex rel.* Arey v. Sherrill, 142 Ohio St. 574, 53 N.E.2d 501 (1944), gave independent significance to matters of statewide concern along with local self-government and local police regulations. But he too would have applied preemption to these matters rather than finding them to be exclusively within the power of the State.

Judge Williams' theory finds some support in the health cases, but the constitutional basis for, or the advisability of, imposing still another theory in the area of police power is difficult to see. Neither the majority in *Arey*, nor the opinions of the court in other cases involving police and fire departments as matters of statewide concern clearly support Judge Williams in his approach. At the same time, they do not appear to hold the power of the State to be exclusive. Rather, after coming close to establishing an independent statewide concern doctrine in the initial case in this area, Cincinnati v. Gamble, 138 Ohio St. 220, 34 N.E.2d 226 (1941), the court slipped back with varying degrees of clarity in subsequent cases to the more traditional approach of finding conflict between state law and city ordinance. *See* State *ex rel.* Daly v. Toledo, 142 Ohio St. 123, 50 N.E.2d 338 (1943); State *ex rel.* Strain v. Houston, 138 Ohio St. 203, 34 N.E.2d 219 (1941); State *ex rel.* O'Driscoll v. Cull, 138 Ohio St. 516, 37 N.E.2d 49 (1941). In two other cases in this period, *In re* Fortune, 138 Ohio St. 385, 35 N.E.2d

In order to trace in detail the scope of both municipal police power and State supervisory power over it, we now turn to an examination of the meaning of the constitutional provision that municipal police regulations shall not be "in conflict with general laws."

II. When Is There a "Conflict"?

A. *"Head-on Collision"*

The extent of municipal independence from state control varies with the expansion and contraction of the concept of local self-government. The extent of state control, on the other hand, depends on the scope of state police regulation and the interpretation courts give to the "no conflict" requirement of the Home Rule Amendment.[36] This section will examine the court decisions bearing on what constitutes a conflict, in order to determine whether there has been any judicial distortion of the constitutional power of the State to control municipal police regulations.

1. Nature of "Head-on Collision" Test

No discussion of what constitutes a conflict in Ohio municipal law could begin at any place other than a consideration of the decision in *Struthers v. Sokol.*[37] In this case the Ohio Supreme Court demanded a clear conflict before it would invalidate a city ordinance. It established what has come to be known as the "head-on collision" test, namely, that there is no conflict unless "the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa."[38] The court went on to list three circumstances which did not constitute a conflict: forbidding something that the statute does not mention, failing to forbid what the statute does forbid, and imposing different penalties even though they might be in excess of what the statute provides. The court further rejected an implied conflict when it said: "No act is either expressly

442 (1941), and State *ex rel.* Giovanello v. Lowellville, 139 Ohio St. 219, 39 N.E.2d 527 (1942), reliance was placed on the *Gamble* decision, but no further clarification of the statewide concern rationale was made while the fact of conflict between ordinance and statute was obvious in each. Three lower court opinions did speak of "exclusiveness," Sullivan v. Civil Service Comm'n, 102 Ohio App. 269 131 N.E.2d (1956); Taylor v. Cleveland, 87 Ohio App. 132, 93 N.E.2d 594 (1950); Smith v. Mayfield Heights, 63 Ohio L. Abs. 483, 108 N.E.2d 681 (C.P. 1952). *See* 25 U. CIN. L. REV. 378 (1956); 20 OHIO ST. L.J. 152 (1959).

[36] OHIO CONST. art. XVIII, § 3, quoted *supra* note 3.

[37] 108 Ohio St. 263, 140 N.E. 519 (1923).

[38] *Id.* syllabus 2.

or inferentially permitted or licensed by either of the ordinances, or the statutes. On the contrary, all acts referred to are forbidden and penalties imposed for violations."[39] Finally, the court found no impediment to the city ordinance simply because there was a state statute on the subject even though this might result in a double prosecution.

Naturally, the first requirement of such a "head-on collision" test is that there be a valid statute. A statute invalid because it is in violation of the state constitution cannot create a conflict with a city ordinance.[40] If there is no state statute pertaining to the same subject matter as the ordinance there is no conflict. This immediately creates problems of interpretation to determine what constitutes the same subject matter. A strict application of the "head-on collision" test obviates many of these problems.[41] More-

[39] *Id.* at 268, 140 N.E. at 521.

[40] Disabled Am. Veterans Chapter No. 2 v. O'Neill, 43 Ohio L. Abs. 479 (C.P. 1944), in which an amendment (120 OHIO L. 663 (1943)) to OHIO GEN. CODE § 13064 (1938) (now OHIO REV. CODE ANN. § 2915.12 (Page Supp. 1966), forbidding lotteries for the operator's "own profit" was held to be in violation of OHIO CONST. art. XV, § 6, which prohibits lotteries "for any purpose whatsoever . . . ." Cincinnati v. King, 11 Ohio Op. 2d 433, 168 N.E.2d 633 (Cincinnati Mun. Ct. 1960), in which OHIO REV. CODE ANN. §§ 2905.34, 3767.01 (Page 1953) were construed together to reach the conclusion that arbitrary exceptions made the former, an anti-obscenity statute, unconstitutional. "There cannot be a conflict of legal consequence between an existing ordinance and an invalid statute. Nothing can come in conflict with a nullity." *Id.* at 438, 168 N.E.2d at 639.

[41] Greenburg v. Cleveland, 98 Ohio St. 282, 120 N.E. 829 (1918), in which a statute making a crime of pickpocketing was held distinguishable from an ordinance which prohibited a person from attempting to steal from another by other than force and violence or putting him in fear; *accord,* Akron v. Williams, 113 Ohio App. 293, 177 N.E.2d 802 (1960), *appeal dismissed,* 172 Ohio St. 287, 175 N.E.2d 174 (1961), in which OHIO REV. CODE ANN. § 2923.01 (Page 1953), dealing with concealed weapons, was held distinguishable from an ordinance prohibiting certain persons from carrying weapons; Cleveland v. Gogola, 68 Ohio L. Abs. 375, 113 N.E.2d 264 (Ct. App. 1953), in which OHIO GEN. CODE § 13408 (1938) (now OHIO REV. CODE ANN. § 2923.28 (Page 1953)), made it a crime for a tramp to enter a house or yard uninvited, while an ordinance provided for the prosecution of a "common beggar" found within the city; Stary v. Brooklyn, 162 Ohio St. 120, 121 N.E.2d 11 (1954), *appeal dismissed,* 348 U.S. 923 (1955), in which the silence of statutory trailer camp regulations concerning the period of occupancy caused the upholding of an ordinance which set requirements; *but see* OHIO REV. CODE ANN. § 3733.06 (Page Supp. 1966), a more recent statutory provision, which supplants this silence and is the subject of interpretation in Noland v. Sharonville, 4 Ohio App. 2d 7, 211 N.E. 90 (1964); Mayer v. Ames, 133 Ohio St. 458, 14 N.E.2d 617 (1938), *cert. denied,* 305 U.S. 621 (1938), in which it was held state licensing of motor vehicles did not prevent a city from requiring inspection.

over, it has been said as a general guideline that in interpreting a statute and an ordinance there is a reasonable presumption the city council did not intend a conflict and none will be found unless reasonable construction makes one "manifestly apparent."[42]

Even given an existing valid statute, the city ordinance is not necessarily invalid. This had been the law before the amendment;[43] it was declared in the *Sokol* case;[44] and it has been regularly held since.[45] Coincidence of purpose, or duplication of remedy, has not been permitted by the courts to be fatal to an ordinance. Nevertheless, the presence of a state statute presents conflict problems. Courts must become involved in the sometimes tedious process of interpretation to determine if the ordinance does in fact permit what the statute prohibits or forbid what the statute permits. This problem existed prior to the amendment,[46] and cases in the notes illustrate the process since.[47] One frequent area of conflict between

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[42] Cincinnati v. Luckey, 85 Ohio App. 463, 87 N.E.2d 894 (1949) (syllabus 2), *aff'd on other grounds,* 153 Ohio St. 247, 91 N.E.2d 477 (1950).

[43] State v. Ulm, 7 Ohio N.P. 659 (C.P. 1896).

[44] Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519 (1923).

[45] Springfield v. Hurst, 144 Ohio St. 49, 56 N.E. 185 (1944); Columbus v. Geren, 1 Ohio L. Abs. 534 (Ct. App. 1923); *Contra, In re* Smith, 14 Ohio N.P. (n.s.) 497 (C.P. 1913).

[46] Prior to the Home Rule Amendment a conflicting ordinance was thought to be outside the power of a municipality. Hays v. St. Marys, 55 Ohio St. 197, 44 N.E. 924 (1899); Caskey v. Belle Center, 8 Ohio N.P. (n.s.) 153 (C.P. 1908); State *ex rel.* Buddenberg v. Tooker, 5 Ohio N.P. 122 (C.P. 1897).

[47] In the following cases the ordinances involved were not invalidated because no conflict was found: Cincinnati v. Luckey, 85 Ohio App. 463, 87 N.E.2d 894 (1949), dealing with OHIO GEN. CODE § 7472 (1938) (now OHIO REV. CODE ANN. § 5589.21 (Page 1953)) which prohibited letting a locomotive "remain upon or across . . . [a public road] for longer than five minutes . . .," while an ordinance was construed to prohibit blocking a crossing for ten minutes through the "operation" of a train; Canton v. Van Voorhis, 61 Ohio App. 419, 22 N.E.2d 651, *appeal dismissed,* 135 Ohio St. 319, 20 N.E.2d 720 (1939), construed an ordinance limiting garbage collection to city employees as being an implementation of power granted to municipal corporations over such matters by OHIO GEN. CODE § 3649 (1938) (now OHIO REV. CODE ANN. § 715.43 (Page 1953)); Cleveland v. Mulloff, 28 Ohio L. Abs. 324 (Ct. App. 1938).

Invalidating conflict was found in the following cases: State *ex rel.* Klapp v. Dayton Power & Light Co., 10 Ohio St. 2d 14, 225 N.E.2d 230 (1967), interpreting OHIO REV. CODE ANN. §§ 4905.20-.21 (Page Supp. 1966), which provided that a municipal corporation can require abandonment of a public utility service only by application to the state Public Utilities Commission, while the city claimed the power to terminate the right of a utility to use its streets without such application; State v. Hess, 50 Ohio L. Abs. 129 (Ct. App. 1947), where state regulations would have permitted "properly located and constructed privies of approved design" in trailer camps,

state law and municipal ordinance has been that involving municipal civil service regulations in police and fire departments. Findings of invalidity have resulted when the court adhered to the theory that the matter was one of statewide concern or, recently, if a non-charter municipality was involved.[48]

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while district board of health regulations provided, "water flushed plumbing equipment must be installed for camps accommodating 25 or more people."; Cincinnati & Suburban Bell Tel. Co. v. Cincinnati, 7 Ohio Misc. 159, 215 N.E.2d 631 (P. Ct. 1964), dealing with OHIO REV. CODE ANN. §§ 4931.01-.11 (Page 1953), which authorized telephone companies to erect poles along public roads and highways so as not to incommode the public use thereof, while a city ordinance required telephone wires to be placed in underground conduits. For questioning comments as to whether there was a conflict in this case or even a police power matter involved, *see* Fordham & Asher, *Home Rule Powers in Theory & Practice,* 9 OHIO ST. L.J. 18, 60 (1948); Hitchcock, *Ohio Ordinances in Conflict with General Laws,* 16 U. CIN. L. REV. 1, 12 (1942).

[48] In State *ex rel.* Strain v. Houston, 138 Ohio St. 203, 34 N.E.2d 219 (1941), the ordinance declared OHIO GEN. CODE § 17-1a (1946) (now OHIO REV. CODE ANN. § 4115.02 (Page Supp. 1965)), dealing with additional leave for firemen, inapplicable. In Cincinnati v. Gamble, 138 Ohio St. 220, 34 N.E.2d 226 (1941), the city established a separate pension system from that of the State for firemen and policemen. In State *ex rel.* O'Driscoll v. Cull, 138 Ohio St. 516, 37 N.E.2d 49 (1941), OHIO GEN. CODE § 486-9a (1946) prohibited educational conditions for civil service, while the city's rule required a four year high school diploma. Smith v. Mayfield Heights, 63 Ohio L. Abs. 483, 108 N.E.2d 861 (C.P. 1952), and State *ex rel.* Giovanello v. Lowellville, 139 Ohio St. 219, 39 N.E.2d 527 (1942), involved conflicts over tenure. In the latter, the fire chief was placed by ordinance on a year to year basis while Ohio Gen. Code § 4389 (1938) (now OHIO REV. CODE ANN. § 737.22 (Page Supp. 1966)) permitted removal only for cause. In State *ex rel.* Daly v. Toledo, 142 Ohio St. 123, 50 N.E.2d 338 (1943), and Leavers v. Canton, 1 Ohio St. 2d 33, 203 N.E.2d 354 (1964), OHIO GEN. CODE § 486-17a (1946) (now OHIO REV. CODE ANN. § 143.27 (Page Supp. 1966)), established tenure during good behavior while the ordinance provided for retirement at age 65. In State *ex rel.* Arey v. Sherrill, 142 Ohio St. 574, 53 N.E.2d 501 (1944) and Sullivan v. Civil Service Comm'n, 102 Ohio App. 269, 131 N.E.2d 611 (1956), OHIO GEN. CODE § 4380 (1938) (now OHIO REV. CODE ANN. § 737.12 (Page 1953)), designated the public service director to hear civil service charges while municipal rules provided for hearing by mayor or city manager. In *In re* Fortune, 138 Ohio St. 385, 35 N.E.2d 442 (1941), OHIO GEN. CODE § 486-17a (1946) (now OHIO REV. CODE ANN. § 143.27 (Page Supp. 1966)) provided for a right to appeal a civil service board determination to the common pleas court while municipal rules made it final. In Hagerman v. Dayton, 147 Ohio St. 313, 71 N.E.2d 246 (1947), OHIO GEN. CODE § 6346-13 (now OHIO REV. CODE ANN. § 1321.32 (1946) (Page Supp. 1962)), prohibited the assignment of wages but a municipal ordinance authorized union dues check-offs from the salaries of civil servants. In State *ex rel.* Petit v. Wagner, 170 Ohio St. 297, 164 N.E.2d 574 (1960), OHIO REV. CODE ANN. § 143.34 (Page Supp. 1966) provided that "Vacancies in positions above the rank of patrolman in a police department shall be filled by promotion from among persons holding positions in a rank lower than the position to be filled." The ordinance, however, provided for a qualification of five years service only on "a" police force for selection as chief. Omitted

Illustrative of the *Sokol* definition of conflict in that the municipal ordinance "licenses" what the state "prohibits" is *Kraus v. Cleveland*,[49] in which an ordinance prescribing licensing of gambling devices was held in conflict with the state antigambling statute. The converse is also said to create a conflict as is evident in the case of *Russo v. State*[50] where the defendant was convicted of contributing to the delinquency of a minor by permitting his stepson to operate an automobile on the streets of Cleveland in violation of an ordinance which barred persons under eighteen years of age from doing so. The statute[51] authorized the issuance of an operator's license without regard to age. The court found that if a drivers license is to be of any value it must act as permission to drive in the state which would, of course, include the city of Cleveland, and therefore there was a "patent conflict" between the ordinance and the statute.[52]

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from the statute was a sentence which appeared in an earlier form when positions in fire departments were also treated: "Appointments to such vacancies shall be limited to members of the respective departments." OHIO REV. CODE ANN. § 143.34 (Page 1953). In both the *Petit* and *Leavers* cases the court treated the problem as involving local self-government and found in each that the ordinance of a non-charter city was invalid because it was at "variance" with the state law.

[49] 135 Ohio St. 43, 19 N.E.2d 159 (1939), involving OHIO GEN. CODE §§ 13056, 13066 (1938) (now OHIO REV. CODE ANN. § 2915.04, .15 (Page 1953)); *accord*, State *ex rel.* Sergi v. Youngstown, 68 Ohio App. 254, 40 N.E.2d 477, *appeal dismissed*, 138 Ohio St. 123, 32 N.E.2d 852 (1941), invalidated an ordinance which, although by its terms licensed games of "skill", amounted to a subterfuge for permitting gambling as disclosed by the pattern of its enforcement. *C.f.* Wells v. Norwood, 64 Ohio L. Abs. 53, 100 N.E.2d 711 (C.P. 1951), sustaining an ordinance where it was construed to license only amusement devices; Gerspacher v. Cleveland, 21 Ohio Op. 537 (C.P. 1941), in which conflict was found between an ordinance which forbade erection of a newsstand on the streets within a prescribed area without a permit and a statute which required the streets be kept free from nuisance and provided for penalizing those who created obstructions.

[50] 14 Ohio Op. 34, 31 N.E.2d 102 (Ct. App.), *appeal dismissed*, 134 Ohio St. 510, 17 N.E.2d 915 (1938).

[51] OHIO GEN. CODE § 6296-11 (1945) (now OHIO REV. CODE ANN. § 4507.10 (Page Supp. 1965)). Age requirements now appear in OHIO REV. CODE ANN. § 4507.08 (Page Supp. 1966).

[52] This case is discussed in Hitchcock, *Ohio Ordinances in Conflict with General Laws*, 16 U. CIN. L. REV. 1, 42 (1942). *Accord*, American Comm. on Maternal Welfare, Inc. v. Cincinnati, 26 Ohio L. Abs. 533 (C.P. 1938); Epoch Producing Corp. v. Davis, 19 Ohio N.P. (n.s.) 465 (C.P. 1917), in which it was ruled that approval of the showing of motion picture films by a state board duly established for that purpose prevented municipalities from barring exhibition within their limits. In both cases conflict was apparent although it was only expressly labeled as such in the former opinion. *See* Canton v. Imperial Bowling Lanes, Inc., 7 Ohio Misc. 292, 220 N.E.2d

It would seem equally clear that for a municipal corporation to require a license in order to engage in a certain activity when that activity is also made the subject of a license issued by the State would thereby create a conflict. The municipal requirement would be more than a cumulative regulation because inherent in the requirement of a license is a prohibition against those who do not obtain one. If a state license were obtained the city would prohibit what the State permitted until a city license were obtained, while if a city license were obtained, the city would be permitting what the State prohibited until a state license were obtained. This is the conclusion reached by the court in *Auxter v. Toledo*[53] with respect to a city requiring a liquor permit when one had already been granted by the state liquor board. However, only a few years before, *Stary v. Brooklyn*[54] had sustained an ordinance which required trailer parks to obtain a license, pay a fee, and abide by regulations,

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151 (Canton Mun. Ct. 1966) and Lyndhurst v. Compola, 112 Ohio App. 483, 169 N.E.2d 558 (1960). The court in the former case refused to follow, and in the latter made no reference to, the decision in Carnabuci v. Norwalk, 70 Ohio App. 429, 46 N.E.2d 773 (1942), in which the court adopted what amounts to a concurrent power theory with the one prior in time gaining the advantage, in this case, the ordinance. In the unreported case of Gozion v. Lakewood, Civil No. 24885 (Cuyahoga County Ct. App. Dec. 18, 1959), *noted in* 12 W. RES. L. REV. 377 (1961), the court found conflict between a municipal ordinance which forbade retail liquor businesses within 800 feet of a school, church, library or public playground and the statute, OHIO REV. CODE ANN. § 4303.26 (Page Supp. 1965) which forbids it within 500 feet without public hearing to determine the advisability of its issuance, where a permit had been issued to operate at a place 650 feet away. The court in Square Deal Coal Haulers & Yardmen's Club, Inc. v. Cleveland, 19 Ohio Op. 71, 176 N.E.2d 348 (C.P. 1961), found conflict with the same statute when an ordinance forbidding the use of any building for the sale of intoxicating liquor within the same distance of such facilities as provided by statute was construed as abrogating the discretionary power to issue the permit vested in the state director of liquor control by the statute.

[53] 173 Ohio St. 444, 183 N.E.2d 920 (1962). OHIO REV. CODE ANN. §§ 4304.12-.27 (Page Supp. 1966) provided: "Each permit issued under sections 4303.02 to 4303.23, inclusive, . . . shall authorize the person named to carry on the business specified at the place . . . described . . . ." The decision was forecast by Spisak v. Solon, 68 Ohio App. 290, 39 N.E.2d 531 (1941), which denied the municipality any "veto" power, and by State *ex rel.* Cozart v. Carran, 133 Ohio St. 50, 11 N.E.2d 245 (1937), in which an ordinance limiting city liquor permits to one for each 3,500 population was held invalid because it limited the discretion of a state official given by statute, OHIO GEN. CODE, § 6064-17 (1945) (now OHIO REV. CODE ANN. § 4303.29 (Page Supp. 1965)), to issue as many as one liquor permit for each 2,000 population, and followed in C. L. Maier Co. v. Canton, 94 Ohio L. Abs. 434, 201 N.E.2d 609 (C.P. 1964), interpreting OHIO REV. CODE ANN. § 3721.03 (Page Supp. 1966).

[54] 162 Ohio St. 120, 121 N.E.2d 11 (1954), *appeal dismissed*, 348 U.S. 923 (1955).

including occupancy limitations, in face of a statutory requirement for a license and a payment of a fee.[55] The case seems to disregard the sound reasoning underlying the law in this area. The court in the *Auxter* case was forced to admit that language in *Stary* relative to the validity of the license was not reconcilable with the *Sokol* rule. But it distinguished the case on the basis that primary attention had been directed at the regulatory aspects of the ordinance, not to the license requirement, and for the additional reason that it was possible that a city might have some special interest with respect to housing which was not present with respect to liquor control.[56] Statutory changes have in effect made express the results of the *Auxter* case by giving affirmative right to use a trailer lot to those having a state license and by making a state license fee exclusive.[57] Thereafter, an appeals court, while also making reference to the comprehensive nature of the state administrative regulations, had no difficulty in finding extensive municipal licensing and regulatory requirements invalid.[58]

Although a state licensing requirement precludes the municipal corporation from making a further requirement of this nature, it can hardly be said that it precludes all further municipal regulation. What regulations could still be permitted? Certainly, those which do not deny what the state permits but which relate to that with which the license cannot fairly be said to be concerned should be sustainable. For example, a license aimed at raising revenue and thus essentially a tax or one establishing basic qualifications should not serve to bar the reasonable exercise of the municipality's police power aimed at correcting specific evils. The pattern developed by cases seems to confirm this approach.[59]

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[55] OHIO GEN. CODE § 1235-3 (1946) (now OHIO REV. CODE ANN. § 3733.04 (Page Supp. 1966).

[56] For the introduction of this new factor the court relied, not on a police regulation case, but on one in which municipal regulation of the weight of vehicles using its streets was held to be a matter of local self-government, Union Sand & Supply Corp. v. Fairport, 172 Ohio St. 387, 176 N.E.2d 224 (1961).

[57] OHIO REV. CODE ANN. §§ 3733.06, .07 (Page Supp. 1966).

[58] Noland v. Sharonville, 4 Ohio App. 2d 7, 211 N.E.2d 90 (1964).

[59] *See* Auxter v. Toledo, 173 Ohio St. 444, 183 N.E.2d 920 (1962). In Kovar v. Cleveland, 60 Ohio L. Abs. 579, 102 N.E.2d 472 (Ct. App.), *appeal dismissed*, 155 Ohio St. 469, 99 N.E.2d 182 (1951), a dog license under state taxing statute, OHIO GEN. CODE § 5652 (1945) (now OHIO REV. CODE ANN. § 955.01 (Page Supp. 1966)), did not immunize unmuzzled dogs from being picked up under authority of a city ordinance enacted under powers granted by the Home Rule Amendment and OHIO GEN. CODE § 3633 (1938) (now OHIO REV. CODE ANN. § 715.23 (Page 1953)). Globe

Another aspect of the *Sokol* test is that there is no conflict simply because the ordinance forbids specific acts which are not mentioned in the general law or omits some acts that are mentioned.[60] This is simply an elaboration of the "head-on collision" test. It prevents drawing an inference from a limited state prohibition that all else is to be free from regulation.[61]

This portion of the test is closely connected with the proposition, previously treated, that there can be no conflict until there is a general law on the same subject matter as the ordinance. Only a fine line exists between entering a virgin field and adding to state requirements. All depends upon how narrowly or broadly the field is defined. But in either instance the admonition of *Sokol* is that there is no conflict unless the ordinance prohibits what the State permits or permits what the state prohibits, all without the aid of inferences. Added restrictions or more stringent ones than are provided in a statute are as valid as if there were no statute,[62] because

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Security & Loan Co. v. Carrel, 106 Ohio St. 43, 138 N.E. 364 (1922), presents the opposite situation: a state license requirement, OHIO GEN. CODE § 6346-1 (1945), and a municipal tax of loan brokers did not result in the invalidation of the latter. In Cambridge v. Elliott, 135 Ohio St. 576, 21 N.E.2d 669 (1939), state approval for the showing of motion picture films apparently did not prevent a city from prohibiting exhibition on Sunday. In Mayer v. Ames, 133 Ohio St. 458, 14 N.E.2d 617, *cert. denied*, 305 U.S. 621 (1938), motor vehicle registration requirements were treated primarily as a tax which did not invalidate municipal vehicle inspection regulations, since the statute was not intended to create an unconditional right in view of statutory grants of authority to municipal corporations to regulate vehicles. In Leet v. Eastlake, 7 Ohio App. 2d 218, 220 N.E.2d 121 (1966), municipal regulation of advertising by real estate brokers by means of "For Sale" signs was apparently found not to conflict with general real estate broker licensing provisions of the state. In Holsman v. Thomas, 112 Ohio St. 397, 147 N.E. 750 (1925), OHIO GEN. CODE § 5868 (1945) providing for the annual licensing of auctioneers did not prevent municipal regulation of auctioneers selling a particular item such as jewelry with respect to ownership of the goods, the time when an auction might be held and residency requirements since, as the court emphasized, the license was of a general nature. Courts have upheld the suspension of the right to operate a vehicle within the corporate limits as part of the penalty for conviction of the violation of municipal ordinances prohibiting reckless driving, Cincinnati v. Sandow, 40 Ohio App. 319, 179 N.E. 151, *appeal dismissed*, 124 Ohio St. 656, 181 N.E. 880 (1931), and driving while intoxicated, Kistler v. Warren, 58 Ohio App. 531, 16 N.E.2d 948 (1937). However, this is essentially a problem of penalties rather than one of licensing.

[60] Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519 (1923) (syllabus 3).

[61] *Id.* at 268, 140 N.E. at 521.

[62] Prior to the adoption of the Home Rule Amendment the opposite conclusion was reached. Canton v. Nist, 9 Ohio St. 439 (1859); Strauss v. Conneaut, 3 Ohio C.C.R. (n.s.) 445 (Cir. Ct. 1902).

in such cases both the ordinance and the statute are prohibiting. Neither can be said to be permitting anything unless one indulges in drawing an inference. Thus there can be no prohibit-permit conflict.[63]

Such an approach as that prescribed by the *Sokol* case, being as liberally in favor of municipal power as the language of the amendment would likely permit, could be expected to undergo some stress over the years. Factors contributing to this are the natural tendency to defer to the state when state-municipal policies are claimed to be at odds and the desire to look for uniformity as an answer where it seems appropriate. Additionally, the lines of demarcation in state-municipal relations are by no means always clear, and in at least one area—finance and taxation—state control is

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[63] Ordinances more restrictive than statute: Cleveland v. Sado, 43 Ohio L. Abs. 183, 61 N.E.2d 910 (Ct. App.), *appeal dismissed,* 146 Ohio St. 126, 64 N.E.2d 322 (1945). The court, in adopting a liberal approach to the matter, found that the statute, OHIO GEN. CODE § 6307-56 (1945) (now OHIO REV. CODE ANN. § 4511.58 (Page Supp. 1965)), which required vehicles to stop five feet from the nearest door of a streetcar stopped for loading or unloading, did not invalidate an ordinance which required stopping to the rear of the car, because the ordinance entered an area not covered by the statute, if there were no rear door, and added little to the statutory requirement, if there were one. Coshocton v. Saba, 55 Ohio App. 40, 8 N.E.2d 572 (1936), construed an ordinance which barred the sale of intoxicating liquor from 10 p.m. to 5 a.m. the following day not to be in conflict with a state Liquor Control Board regulation prohibiting such sales from 12 a.m. to 5:30 a.m. *But see* Neil House Hotel Co. v. Columbus, 144 Ohio St. 248, 58 N.E.2d 665 (1944), and the doctrine of conflict by implication notes 83-100 and accompanying text *infra.* Heidle v. Baldwin, 118 Ohio St. 375, 161 N.E. 44 (1928), sustained an ordinance which required vehicles to come to a full stop and change gears when coming to the intersection of a thoroughfare when statutory requirements were not that stringent.

Ordinances defining a crime more broadly than statute: Columbus v. Barr, 160 Ohio St. 209, 115 N.E.2d 391 (1953), omitting from an ordinance prohibiting the sale of lottery tickets the requirement that the sale be for the seller's own profit as was provided in the statute, OHIO GEN CODE § 13064 (1938) (now OHIO REV. CODE ANN. § 2915.12 (Page Supp. 1966)), did not constitute a conflict; Sidney v. Thompson, 118 Ohio App. 512, 196 N.E.2d 112 (1962), sustaining the validity of an ordinance which made a crime of being "in actual physical control of any vehicle . . ." while intoxicated although the statute, OHIO REV. CODE ANN. § 4511.19 (Page Supp. 1965), omitted this provision; Cleveland v. Jones, 89 Ohio L. Abs. 353, 84 N.E.2d 494 (Ct. App. 1962), sustaining an ordinance prohibiting gambling transactions concerning more contingencies than the statute, OHIO REV. CODE ANN. § 2915.111 (Page Supp. 1966). *See also* Toledo v. Kohlhofer, 96 Ohio App. 355, 122 N.E.2d 20 (1954), where an ordinance which omitted the element of scienter in making the sale of contraceptives a crime as was required in a statute, OHIO GEN. CODE § 13035 (1938) (now OHIO REV. CODE ANN. § 2905.34 (Page Supp. 1966)), was said not to be in conflict, but the court then interpreted the ordinance so as to make it require this element.

admittedly extensive. Furthermore, the very nature of the case method of piecemeal application of a rule is sufficient reason to anticipate such difficulties. Whatever the cause, there are some cases which either through the courts' approach or their manner of expression have raised the question of whether, without qualification, *Sokol* is firmly embedded.

In the 1920's the supreme court in several cases used language somewhat different from, although at times coupled with, the "no conflict" expressions of the amendment and of *Sokol*. Even though these expressions might lend themselves to the interpretation of stronger state control than "head-on collision" would indicate, this is not necessarily true. There is no clear indication that any different test was being formulated. Rather, these expressions might simply have resulted from the emphasis in these cases which was directed primarily at the state power issue. Additionally, the nature of the municipal intrusion was perhaps more severe than might simply be termed a conflict.[64] This method of expression appears again in a more recent case without any discernible shift in approach.[65]

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[64] Hecker v. State *ex rel.* Cleveland, 111 Ohio St. 168, 144 N.E. 700 (1924), held that a village could not "prevent" what the State authorizes with respect to health, by declaring a state authorized garbage disposal plant of another municipality a nuisance or by refusing to issue a building permit for its sanitary expansion. In Bucyrus v. State Dep't. of Health, 120 Ohio St. 426, 166 N.E. 370 (1929), the State could order a city to provide for a sewage disposal plant as a matter of statewide concern and the city could not "curtail the effect or defeat the enforcement of the sanitary regulations of the state." *Id.*, at 429, 166 N.E. at 371. Nelsonville v. Ramsey, 113 Ohio St. 217, 148 N.E. 694 (1925) and Lorain St. R.R. v. Public Util. Comm'n., 113 Ohio St. 68, 148 N.E. 577 (1925), both raised local self-government issues, but the court used a police regulation rationale in striking down in the first case what amounted to a complete denial of a Public Utilities Commission prescribed route for motor busses as a "material interference" therewith, and in sustaining ordinances in the second case directed against congestion of traffic, as not being an "interference" with Public Utilities Commission regulations. In Niehaus v. State *ex rel.* Bd. of Education, 111 Ohio St. 47, 144 N.E. 433 (1924), although the court spoke of conflict, it seemed to place education beyond the municipal power, while adding that the municipality was without power to "thwart" the operation of the general laws, which would certainly be consistent with the theory of state exclusiveness.

Clearly, a conflict existed in the *Hecker, Nelsonville,* and *Niehaus* cases, regardless of the language used. Moreover, its use apparently did not affect the result reached in the *Lorain* case in which the ordinances were sustained, and the *Bucyrus* case involved what was essentially a state power problem.

[65] State *ex rel.* Gordon v. Rhodes, 156 Ohio St. 81, 100 N.E.2d 225 (1951), states that a municipality has no right by the exercise of its local police power or powers of local self-government to hamper the state in the exercise of its sovereign powers not granted away.

2. Preemption Doctrine

Expressions of preemption or what amounts to preemption are of more concern. The theory is based on the entrance of a governmental body into a field of regulation with the intent to seize it to the exclusion of others. It is found either in the express words of the regulatory measures or implied from their nature or that of the subject being regulated, and presupposes the power to exclude. Therefore, preemption is much more extensive than "conflict" and in fact is in direct contradiction to the *Sokol* interpretation thereof. Its adoption would open the door to a greatly expanded state power over the municipality. Taken with a contracted definition of local self-government and the requirement that a charter be adopted before a municipal corporation can fully exercise such powers, it could all but eliminate Home Rule. In fact, the doctrine of preemption would be a convenient, although not straightforward, way of changing the structure of state-municipal relationships without need for additional constitutional amendments.

Has the preemption approach been adopted by the courts? It has not to the extent of replacing the *Sokol* rule, as the cases previously discussed in this section would indicate. Yet the language of preemption persistently makes its appearance in many of the opinions of the courts so that it is necessary to determine whether it has prevailed or is likely to prevail in a limited area of state-municipal exercise of the police power. Those cases in which it was found there had been no preemption in the course of sustaining the ordinance can be set aside, as it is quite likely that the doctrine had not been seriously considered.[66] Also to be set aside are those cases in which taxation is involved, for the nature of state power over the municipality in this area by virtue of special constitutional provisions[67] is sufficiently different to justify a line of demarcation between the

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[66] Akron v. Williams, 113 Ohio App. 293, 177 N.E.2d 802 (1960), *appeal dismissed*, 172 Ohio St. 287, 175 N.E.2d 174 (1961); Davis v. McPherson, 72 Ohio L. Abs. 232, 132 N.E.2d 626 (Ct. App.), *appeal dismissed*, 164 Ohio St. 296, 130 N.E.2d 342 (1955). However, hints of this doctrine in Stary v. Brooklyn, 162 Ohio St. 120, 121 N.E.2d 11 (1954), *appeal dismissed*, 348 U.S. 923 (1955), proved influential in leading an appeals court in Noland v. Sharonville, 4 Ohio App. 2d 7, 211 N.E.2d 90 (1964), to rest its decision on a preemption ground. *See also* State, *ex rel.* Wynne v. Urban, 91 Ohio App. 514, 107 N.E.2d 637 (1952); Columbus Legal Amusement Ass'n v. Columbus, 50 Ohio L. Abs. 353, 79 N.E.2d 915 (Ct. App. 1947); Mayer v. Ames, 133 Ohio St. 458, 14 N.E.2d 617 (1938), *cert. denied*, 305 U.S. 621 (1938).

theory developed there and the body of law established around the "no conflict" Home Rule provisions.[68] It also seems reasonable to give no undue significance here to those cases which deal with the creation or maintenance of courts or the judicial procedure used in connection with them, since by judicial construction this area is within the exclusive control of the State. As a consequence, such expressions, although unfortunate because they undercut the theory of state authority in this area, do not decrease municipal police power authority.[69]

Before considering the remaining preemption cases, notice should be taken of judicial expressions denying the availability of the preemption doctrine in the area of municipal police power. One such expression is found in dictum in an early landmark case:

> [I]f there were a statute creating the same offense, it could not be exclusive, even if the general assembly of Ohio in express terms prohibited the municipality from legislating upon the same subject-matter. *City of Fremont v. Keating*, 96 Ohio St. 468.[70]

In a more recent reaffirmation of the no preemption doctrine, the court said:

> The Legislature cannot deprive a municipality of that constitutional power, directly or indirectly. The validity of a local police regulation therefore depends not on any question of a state prohibition or pre-emption of the municipal constitutional power, but rather upon existence of a 'conflict.'[71]

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[67] OHIO CONST. art. XIII, § 6; art. XVIII, § 13. These provisions directly authorize state limitations upon the municipal power to tax and to incur debt. It is in the development of the law with respect to them that the court has applied the doctrine of preemption. Unfortunately this area is at times confused with that of police regulations and conflict. State *ex rel.* McElroy v. Akron, 173 Ohio St. 189, 181 N.E.2d 26 (1962); Noland v. Sharonville, 4 Ohio App. 2d 7, 211 N.E.2d 90 (1964).

[68] State *ex rel.* McElroy v. Akron, 173 Ohio St. 189, 181 N.E.2d 26 (1962); Columbus v. Miqdadi, 25 Ohio Op. 2d 337, 195 N.E.2d 923 (Columbus Mun. Ct. 1963). Nolan v. Sharonville, 4 Ohio App. 2d 7, 211 N.E.2d 90 (1964), might be given similar treatment as it involved express preemption provisions in a tax statute, OHIO REV. CODE ANN. § 4503.06 (J) (Page 1953), were it not for the fact that the court also applied its preemption language to the regulatory aspects of the case.

[69] Myers v. Defiance, 67 Ohio App. 159, 36 N.E.2d 162 (1940) (designation of a person within a county to receive service of process); Unlerwood v. Isham, 61 Ohio App. 129, 22 N.E.2d 468, *appeal dismissed*, 135 Ohio St. 320, 20 N.E.2d 719 (1939) (application of city civil service regulations to court employees); *In re* Parks, 45 Ohio L. Abs. 379, 67 N.E.2d 713 (1946) (manner of enforcing payment of fines).

[70] Greenburg v. Cleveland, 98 Ohio St. 282, 286, 120 N.E. 829, 830 (1918).

This leaves relatively few cases which require more careful scrutiny because preemption was ostensibly applied. One trial court case is of little significance since it was decided when pre-1912 theories lingered.[72] Another trial court decision dealt with the preemptive effect that is to be derived from a limited grant of statutory authority to a municipality and therefore was more concerned with what constitutes a general law than with the conflict issue.[73] Of the remaining cases in which the courts affirmatively stated there was preemption of a field by state regulation, an appeals court decision[74] and one at the trial level[75] were decided when the theory of statewide concern had been in the ascendency for nearly ten years, both placing special reliance on this concept. Only a few years before, Judge Williams in his concurring opinion in *Sate ex. rel. Arey v. Sherrill*[76] developed the theory that police regulations were limited to those ordinances which defined misdemeanors and prescribed their punishment, while matters generally within the police power were matters of statewide concern to which preemption was to be applied when the state entered a field by way of regulation. In addition, the *Taylor* decision did not in fact involve a conflict issue.[77] An appeals court in a recent case invalidated municipal regulation of trailer parks on the ground of state preemption of the field. Statutes had previously been passed which made the state imposed license fee exclusive and granted the right of uninterrupted use to a licensee. But in reaching its conclusion, the court did not draw a clear distinction between the theories of preemption and conflict nor did it entirely separate the effect of applicable state tax statutes.[78] The relationship between municipal zoning ordinances which prohibited the sale of intoxicating liquor in named districts and permits to sell at locations therein issued by the state Depart-

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[71] Columbus v. Glascock, 117 Ohio App. 63, 64, 189 N.E.2d 889, 890, *appeal dismissed*, 174 Ohio St. 9, 185 N.E.2d 437 (1962). The court carefully distinguished between the areas of taxation and police regulation and pointed out the applicability of the preemption doctrine only to the former. *Accord*, Akron v. Scalera, 135 Ohio St. 65, 19 N.E.2d 279 (1939).

[72] *In re* Smith, 14 Ohio N.P. (n.s.) 497 (C.P. 1913).

[73] Washington v. Thompson, 80 Ohio L. Abs. 598, 160 N.E.2d 568 (C. P. 1949).

[74] Taylor v. Cleveland, 87 Ohio App. 132, 93 N.E.2d 594 (1950).

[75] Ferrie v. Sweeney, 34 Ohio Op. 272, 72 N.E.2d 128 (C. P. 1946).

[76] 142 Ohio St. 574, 53 N.E.2d 501 (1944).

[77] The court found the plaintiff fireman was not entitled to extra compensation for alleged overtime work because the regular work week was established by applicable state laws unchanged by ordinance.

[78] Noland v. Sharonville, 4 Ohio App. 2d 7, 211 N.E.2d 90 (1964).

ment of Liquor Control was in issue in two lower court decisions.[79] In each, the courts clearly found the ordinances invalid because of conflict, but only after the state regulations of liquor were described as preemptive of the field even though the *Sokol* case involved the same field of regulation. In neither case was there any evidence of judicial recognition of differences between the conflict and preemption approaches. The final case,[80] also at the trial level, amounted to no more than an expression of preemption as the court discussed and placed its finding on "no conflict" precedent.

Only in the *Ferrie* case did the court need to depend upon the preemption doctrine to reach a result unobtainable under the "no conflict approach.[81] But even this case cannot be used in full support of the preemption doctrine because of the great weight the court placed upon the expenditure not being for a "public purpose" which it defined somewhat narrowly.

In the light of the analysis of the above cases several conclusions can be drawn: (1) the *Sokol,* "head-on collision" test for conflict has not been replaced; (2) preemption has not received considered support as a doctrine but rather it has been mentioned only from time to time largely as a method of expression and then almost exclusively in decisions at lower court levels; (3) if there is any discernible pattern in these cases as to when expression of preemption will appear it is that they generally involve areas (a) which have been specially denominated of statewide concern,[82] (b) where

[79] Lyndhurst v. Compola, 112 Ohio App. 483, 169 N.E.2d 558 (1960), Canton v. Imperial Bowling Lanes, Inc., 7 Ohio Misc. 292, 220 N.E.2d 151 (Canton Mun. Ct. 1966).

[80] Williams v. Jackson, 82 Ohio L. Abs. 177, 164 N.E.2d 195 (C. P. 1959).

[81] Ferrie v. Sweeney, 34 Ohio Op. 272, 72 N.E.2d 128 (C. P. 1946). The court construed statutory integration of child welfare care in the county on the basis of financial need as an expression of intention by the legislature "to occupy the entire field of child welfare," *Id.* at 275, 72 N.E.2d at 132, so as to preclude the city from maintaining day care centers for children of mothers who were not indigent. The court reached this result without deciding whether the state program itself was exclusive. That the State has the power to make separate health districts and charge them with duties otherwise performed by municipalities has been previously noted. However, it is difficult to see how what was essentially a supplemental program here could have constituted a "head-on collision."

[82] Stary v. Brooklyn, 162 Ohio St. 120, 121 N.E.2d 11 (1954), *appeal dismissed,* 348 U.S. 923 (1955); Davis v. McPherson, 72 Ohio L. Abs. 232, 132 N.E.2d 626 (Ct. App.), *appeal dismissed,* 164 Ohio St. 296, 130 N.E.2d 342 (1955); Ferrie v. Sweeney, 34 Ohio Op. 272, 72 N.E.2d 128 (C. P. 1946). *See* State *ex rel.* Arey v. Sherill, 142 Ohio St. 574, 53 N.E.2d 501 (1944); Taylor v. Cleveland, 87 Ohio App. 132, 93 N.E.2d 594 (1950).

state regulations tend to be extensive[83] or (c) a state license was required.[84] It is unfortunate that courts have persisted in using preemption language when it not only is inaccurate but generally unnecessary. Too little consideration has been given in the particular case to the full implications the adoption of such a doctrine would have on municipal law in the area or to the danger that repeated use of its terminology will lead to its adoption in the future.

B. *Conflict by Implication*

In treating the *Sokol* case it was concluded that the "head-on collision" test for conflict did not permit an inference to be drawn from a state prohibition that what was not prohibited was permitted. If this was not clear from the statement of the test itself it became so from the further statement by the Ohio Supreme Court that "[a] police ordinance is not in conflict with a general law upon the same subject merely because certain specific acts are declared unlawful by the ordinance, which acts are not referred to in the general law . . . ."[85] It is this rationale which underlies those cases in which ordinances have been sustained even though they expanded the restriction of a statute or state regulation or made it more stringent.

Moreover, the court in *Sokol* directly referred to the claim that inferences of permission might be drawn from the state prohibition in these words: "[n]o act is either expressly or inferentially permitted or licensed by either of the ordinances, or the statutes. On the contrary, all acts referred to are forbidden and penalties imposed for violations."[86] It would seem that there could be no conflict if both the ordinance and the statute consisted of prohibitions. Yet at times one feels compelled to say that what is not being prohibited is being

[83] Stary v. Brooklyn, 162 Ohio St. 121, 120 N.E.2d 11 (1952), *appeal dismissed*, 348 U.S. 923 (1955); Noland v. Sharonville, 4 Ohio App.2d 7, 211 N.E.2d 90 (1964); Lyndhurst v. Compola, 112 Ohio App. 483, 169 N.E.2d 558 (1960), Williams v. Jackson, 82 Ohio L. Abs. 177, 164 N.E.2d 195 (C. P. 1959); Ferrie v. Sweeney, 34 Ohio Op. 272, 72 N.E.2d 128 (C. P. 1946); Canton v. Imperial Bowling Lanes, Inc. 7 Ohio Misc. 292, 220 N.E.2d 151 (Canton Mun. Ct. 1966).

[84] Stary v. Brooklyn, 162 Ohio St. 121, 120 N.E.2d 11 (1954), *appeal dismissed*, 348 U.S. 923 (1955); Mayer v. Ames, 133 Ohio St. 458, 14 N.E.2d 617 (1938), *cert. denied*, 305 U.S. 621 (1938); Noland v. Sharonville, 4 Ohio App. 2d 7, 21 N.E.2d 90 (1964); Lyndhurst v. Compola, 112 Ohio App. 483, 169 N.E.2d 558 (1960); Columbus Legal Amusement Ass'n v. Columbus, 50 Ohio L. Abs. 353, 79 N.E.2d 915 (Ct. App. 1947); Canton v. Imperial Bowling Lanes, Inc., 7 Ohio Misc. 292, 220 N.E.2d 151 (Canton Mun. Ct. 1966).

[85] Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519 (1923) (syllabus 3).

[86] *Id.* at 268, 140 N.E. at 521.

permitted, for on occasion we, as well as legislatures, express ourselves in that way. Only a few years after *Sokol* the supreme court recognized this compulsion in another landmark case, *Schneiderman v. Sesanstein.*[87] Here the court found an ordinance which totally prohibited speeds in excess of fifteen miles per hour by motor vehicles driven in school zones, in conflict with a statute which made driving at a "speed greater than . . . twenty-five miles an hour . . . *prima facie* evidence of a rate of speed greater than is reasonable and proper."[88] As the court said: "[W]hen the law of the state provides that a rate of speed greater than a rate therein specified shall be unlawful, it is equivalent to stating that driving at a less rate of speed shall not be a violation of law . . . ."[89] Additional reliance was placed on a statutory provision which required these resrtictions not be "diminished, restricted or prohibited by an ordinance, rule or regulation of a municipality or other public authority."[90] In reaching this conclusion the court rejected the dissent's argument that a school zone ordinance was only making more specific the basic anti-recklessness purpose of the statute, and that, in any case, regulation of speed was a power of local self-government. In all probability, the court's desire for uniformity and evidence of the same desire on the part of the legislature through its prohibition against municipal variations[91] proved too much for the court to resist. Both the statute and the ordinance were prohibitions and the ordinance was invalidated, a result specifically rejected by *Sokol* for even more restrictive ordinances.[92]

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[87] 121 Ohio St. 80, 167 N.E. 158 (1929).

[88] OHIO GEN. CODE § 12603 (1938) (now OHIO REV. CODE ANN. § 4511.21 (Page 1953)).

[89] Schneiderman v. Sesanstein, 121 Ohio St. 80, 86, 167 N.E. 158, 160 (1929).

[90] OHIO GEN. CODE § 12608 (1938). In fact, the court decided 32 years after *Schneiderman* that the decision "rested largely" on this provision. Union Sand & Supply Corp. v. Fairport, 172 Ohio St. 387, 390, 176 N.E.2d 224, 226 (1961).

[91] Express denial of power to a municipal corporation obviously does not clearly fit within the *Sokol* test, but rather raises the question of whether such a statute is a "general law" within the meaning of the Home Rule Amendment. This question, and particularly this statute, will be considered in this regard in the next section of the article.

[92] It has been suggested that there is no *necessary* implication from a negative statute that lesser speeds are permitted by it since common law without benefit of a statute would have permitted such speeds; and if only *reasonable* implications are permitted ordinances will frequently be in conflict. *See* Duffey, *Non-Charter Municipalities: Local Self-Government,* 21 OHIO ST. L.J. 304, 328 n. 65 (1960). In Eshner v. Lakewood, 121 Ohio St. 106, 166 N.E. 904 (1929), a companion case to Schneiderman v. Sesanstein, 121 Ohio St. 80, 167 N.E. 158 (1929), the court reached the same result even though the ordinance proscribed speed over a rate which was the same as the

The next stress placed upon the *Sokol* test came with the decision of *Neil House Hotel Co. v. Columbus*,[93] involving a liquor regulation.[94] A Liquor Control Board regulation prohibited the sale of liquor or beer by certain permit holders between the

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statute. But the proscription of the ordinance was absolute while the statute provided for taking other factors into consideration in determining reasonable speed, and made speed over the stated rate only *prima facie* evidence of unreasonable speed. Reliance was also placed on the provisions of OHIO GEN. CODE § 12608 (1938). These cases had been anticipated in result in F. D. Lawrence Electric Co. v. Enterprise Lumber Co., 28 Ohio App. 30, 162 N.E. 434 (1924), involving the same statutes. There principal reliance was placed upon the no variation provisions of OHIO GEN. CODE § 12608 (1938).

Provisions of OHIO GEN. CODE § 12603 (1938) were amended within a few months of the *Schneiderman* case obviating the problem present there and showing the legislature's agreement with the result reached: "It shall be prima facie lawful for the operator of a motor vehicle to drive the same at a speed not exceeding the following." 113 OHIO L. 283 (1929). With this express permission before it, the court in Schwartz v. Badila, 133 Ohio St. 441, 14 N.E.2d 609 (1938), had no difficulty in invalidating an ordinance which made speed less than that set by statute prima facie unlawful even though this resulted, according to the ordinance, only when the speed was "inconsistent with the absolute safety of pedestrians and other vehicular traffic by reason of weather conditions, highway conditions, congestion of traffic, or any cause whatsoever . . . ." *Id.* (syllabus 2). It has been said of this case that conflict was not inevitable and at most the ordinance served to shift the burden of proof. Fordham & Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18, 54, 55 (1948).

Both OHIO GEN. CODE § 12603 and § 12608 have been repealed by 119 Ohio L. 766, § 112 (1941). The former section has been replaced by OHIO REV. CODE ANN. § 4511.21 (Page Supp. 1965).

During this period, conflict by implication was rejected by the Supreme Court of the United States on Ohio authority, United States Fidelity & Guaranty Co. v. Guenther, 281 U.S. 34 (1930), where a prohibition against children under 16 years of age from operating a motor vehicle established by OHIO GEN. CODE § 13002 (now OHIO REV. CODE ANN. § 4109.14 (Page 1953)) was held not to invalidate an ordinance placing the age at 18.

[93] 144 Ohio St. 248, 58 N.E.2d 665 (1944).

[94] Prior to this case, conflict by implication had been rejected in two cases involving liquor regulations, Akron v. Scalera, 135 Ohio St. 65, 19 N.E.2d 279 (1939); Coshocton v. Saba, 55 Ohio App. 40, 8 N.E.2d 572 (1936), although in the latter case the court had not been referred to any statute or regulation dealing specifically with the subject of the ordinance. It has been suggested, Fordham & Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18, 48 (1948), that another pre-*Neil House* case, State *ex rel.* Cozart v. Carran, 133 Ohio St. 50, 11 N.E.2d 245 (1937), actually involved conflict by implication. The statute, OHIO GEN. CODE § 6064-17 (1945) (now OHIO REV. CODE ANN. § 4303.29 (Page 1953)) provided that "not more than one . . . permit shall be issued for each two thousand population, . . ." while the ordinance was more stringent in that it provided permits "shall be limited to one for every thirty-five hundred (3500) of the population of the city of East Cleveland. . . ." If the statute and ordinance were standing alone, the conflict that the court found would

hours of 2:30 and 5:30 a.m., while a Columbus ordinance proscribed sales between 12 midnight and 5:30 a.m. The court, relying on *Schneiderman,* concluded that prohibiting sales during specified times was the equivalent of permitting them the rest of the time, and therefore an ordinance which limited this latter period was in conflict. As appears more clearly in the appeals court decision,[95] the court had to take into account other statutory provisions which gave some credence to the idea that permission to sell during the nonprohibited period was intended.[96] This approach has been followed in other cases which have involved these liquor control statutes and regulations.[97]

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appear to arise from the implication, and certainly a rather compelling one, derived from the negative language of the statute that the state liquor control department has been granted permission to grant permits between 2000 and 3500 population, which is denied by the ordinance. However, reliance on such an implication need not be made, since specific authority to issue the permit therein involved was granted by OHIO GEN. CODE §§ 6064-8 and 6064-15 (1945) (now OHIO REV. CODE ANN. §§ 4301.10 and 4303.15 (Page 1953)).

[95] 45 Ohio L. Abs. 400, 68 N.E.2d 210 (Ct. App.), *aff'd,* 144 Ohio St. 248, 58 N.E.2d 665 (1944).

[96] OHIO GEN. CODE § 6064-20 (1945) (now OHIO REV. CODE ANN. § 4303.27 (Page Supp. 1966)) provided that a permit "shall authorize the person named to carry on the business specified at the place . . . described . . . ." OHIO GEN. CODE § 6064-15 (1945) (now OHIO REV. CODE ANN. §§ 4303.16-.18 (Page Supp. 1965)), provided that D-3a permit holders were to pay an additional $400 if their place of business stayed open after 1:00 a.m. and were permitted to sell liquor during the same hours as a D-5 permit holder. The latter is a night club operator which is defined as one open habitually after midnight. OHIO GEN. CODE § 6064-1 (now OHIO REV. CODE ANN. § 4301.01 (Page 1953). From these provisions the court concluded that sales after 1:00 a.m. were contemplated, since a D-3a permit holder gained no other advantage for his additional fee, and the regulations of the Board adopted through its rulemaking power set this time precisely.

[97] *See* Columbus v. Mauk, 1 Ohio App. 2d 38, 203 N.E.2d 653 (1963), despite doubts of a concurring judge as to the soundness of the rationale of the *Neil House* case; Kaufman v. Paulding, 92 Ohio App. 169, 109 N.E.2d 531 (1951), but prohibition of liquor on Sundays was upheld under authority granted municipalities by OHIO GEN. CODE § 6064-22 (1945) (now OHIO REV. CODE ANN. § 4301-22 (Page 1953)); Williams v. Jackson, 82 Ohio L. Abs. 177, 164 N.E.2d 195 (C.P. 1959). For further consideration of the question of municipal control of liquor *see* 12 W. RES. L. REV. 377 (1961). Statutory provisions with respect to civil service promotions, OHIO GEN. CODE § 486-15a (1946) (now OHIO REV. CODE ANN. § 143.34 (Page 1953)), requiring "at least twelve months in the next lower grade or rank," did not invalidate a municipal rule requiring two years service before a promotional examination could be taken. State *ex rel.* Wynn v. Urban, 91 Ohio App. 514, 107 N.E.2d 637 (1952). In distinguishing *Neil House,* the court concluded that it "at least" impliedly left open to a municipality the option to provide for a longer period.

The *Neil House* case does not appear to be as serious an inroad into the *Sokol* test as *Schneiderman* since, in addition to the support of statutory interpretation, a "permit" was issued in *Neil House* which was absent in *Schneiderman*. If this is a formal distinction it is nevertheless one which ought to carry weight in the settlement of an issue which might turn on an accident of phraseology.

The danger in *Schneiderman,* and to a lesser extent in *Neil House,* is that the results reached will not be limited to the facts of the particular cases and thus will serve to destroy the *Sokol* rule. Fortunately for municipal police power enthusiasts this does not appear to have happened. In several cases involving criminal statutes and ordinances, the defendant has urged that since the ordinance is broader than the statute it conflicts with implied permission to do that which was not prohibited by the terms of the statute. This direct attack upon *Sokol* has not succeeded.[98]

Despite these results, and the likelihood that sufficient precedent exists to continue to wed the courts to the *Sokol* approach in most cases, this approach has had to make room for "conflict by implication." The future coexistence of these two essentially conflicting theories may not be a peaceful one. A recent case graphically demonstrates the subtle distinctions which can permeate this issue.[99] The charge under a municipal ordinance was failure to stop on a yellow signal. The ordinance required stopping, while the statute[100] indicated that the yellow signal serves to warn the driver that a red light will be exhibited immediately after and that pedestrians lawfully in the intersection have the right of way. The statute did not *prohibit* proceeding through the intersection on a yellow light as did the ordinance but did it *permit* proceeding so as to come within the *Sokol* test?[101] The court, citing both *Sokol* and *Schneid-*

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[98] A statutory prohibition of lotteries for profit, OHIO GEN. CODE §§ 13063 to-64-1 (1938) (now OHIO REV. CODE ANN. §§ 2915.10-.13 (Page 1953)), did not grant a privilege to operate not for profit, in Wishing Well Club, Inc. v. Akron, 66 Ohio L. Abs. 406, 112 N.E.2d 41 (C.P. 1951). The supreme court has based this result on the ground that all lotteries were unconstitutional under OHIO CONST. art. XV, § 6, and therefore the legislature could not be said to have impliedly authorized them. Columbus v. Barr, 160 Ohio St. 209, 115 N.E.2d 391 (1953). However, in a case not involving lotteries, the court sustained an ordinance squarely on the *Sokol* ground that a municipal ordinance can go further than a statute in prohibiting a transaction without conflict. Benjamin v. Columbus, 167 Ohio St. 103, 146 N.E.2d 854 (1957), *cert. denied,* 357 U.S. 904 (1958).

[99] Springfield v. Stovall, 117 Ohio App. 203, 192 N.E.2d 72 (1962).

[100] OHIO REV. CODE ANN. § 4511.13 (Page Supp. 1965).

erman, ruled the ordinance invalid, based on the conclusion that the statute implied that the motorist was not required to stop. Before the shortcoming of this rationale is belabored, consider the very important emphasis the court placed upon the fact that "a motorist is entitled to some assurance that the 'rules of the road' are the same regardless of where he travels."[102]

C. *Conflict Through Differing Policies*

The final element in the *Sokol* test is the conclusion that there is no conflict merely because "different penalties are provided for the same acts, even though greater penalties are imposed by the municipal ordinance."[103] For many years courts have had no difficulty in applying this rule. The power of the municipality through the Home Rule Amendment to define minor crimes[104] and to prescribe for their punishment[105] has been recognized. Providing by ordinance for a lesser,[106] different[107] or greater[108] penalty than that prescribed by statute has been accepted under *Sokol* as not constituting a conflict. It has been held that the issue of conflict is not resolved on the basis of the penalties provided.[109] As to the

[101] Or, is this a *necessary* implication? *See, e.g.,* Duffey, *Non-Charter Municipalities: Local Self-Government,* 21 OHIO ST. L.J. 304, 328 n.65 (1960).

[102] Springfield v. Stovall, 117 Ohio App. 203, 206, 192 N.E.2d 72, 74 (1962). *But cf.* Heidle v. Baldwin, 118 Ohio St. 375, 161 N.E. 44 (1928), where the court, treating it as an additional regulation, did not question an ordinance which required a vehicle to come to a complete stop when approaching an intersection with a thoroughfare, although the statute merely gave those on the through street the right of way.

[103] Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519 (1923) (syllabus 3). *See generally* Note, *Validity of Municipal Ordinances Prescribing Penalties Greater than State Laws,* 20 U. CIN. L. REV. 400 (1951).

[104] *In re* Calhoun, 87 Ohio App. 193, 94 N.E.2d 388 (1949).

[105] Dayton v. Miller, 154 Ohio St. 500, 96 N.E.2d 780 (1951).

[106] Lorain v. Petralia, 8 Ohio L. Abs. 159 (Mun. Ct. 1929).

[107] Toledo v. Best, 172 Ohio St. 371, 176 N.E.2d 520 (1961), *appeal dismissed,* 369 U.S. 657 (1962); Stary v. Brooklyn, 162 Ohio St. 120, 121 N.E.2d 11, (1954), *appeal dismissed,* 348 U.S. 923 (1955); Youngstown v. Evans, 121 Ohio St. 342, 168 N.E. 844 (1929); Toledo v. Kohlhofer, 96 Ohio App. 355, 122 N.E.2d 20 (1954); Kistler v. Warren, 58 Ohio App. 531, 16 N.E.2d 948 (1938); Hiram v. Conner, 85 Ohio L. Abs. 161, 173 N.E.2d 408 (Ravenna Mun. Ct. 1960).

[108] Matthews v. Russell, 87 Ohio App. 443, 95 N.E.2d 696 (1949); *In re* Calhoun, 87 Ohio App. 193, 94 N.E.2d 388 (1949); Ermekeil v. State, 8 Ohio L. Abs. 121 (Ct. App. 1930); and a pre-Amendment case, Lorain v. Maraldi, 19 Ohio C.C.R. (n.s.) 58 (Cir. Ct. 1909), *aff'd,* 81 Ohio St. 539, 91 N.E. 1134 (1909).

[109] Toledo v. Kholofer, 96 Ohio App. 355, 122 N.E.2d 20 (1954); *In re* Calhoun, 87 Ohio App. 193, 94 N.E.2d 388 (1949). Only one discordant note to the acceptance of the validity of an ordinance which imposes a greater penalty than a statute has been sounded, and that by Judge Hart, dissenting in Stary v. Brooklyn, 162 Ohio

form of the penalty, constitutional limitations must be met.[110] Nevertheless, the traditional penalties of fine or imprisonment have been sustained, as has forfeiture of property used in the violation of an ordinance[111] and suspension of the right to operate a motor vehicle within the city.[112]

The generally well settled condition of the law with respect to penalties under the *Sokol* test was rudely disturbed after thirty-five years in *Cleveland v. Betts*.[113] In that case the court was faced with the claim of conflict between an ordinance which defined carrying a concealed weapon as a misdemeanor in the same terms as the statute which made the offense a felony.[114] The court acknowledged

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St. 120, 141-42, 121 N.E.2d 11, 22 (1954), *appeal dismissed*, 348 U.S. 923 (1955). Considerations in favor of uniformity of penalty have thus not prevailed.

However, two problems related to the punishment of crime appear to be unsettled. It was held in *In re* Parks, 45 Ohio L. Abs. 379, 67 N.E.2d 459 (Ct. App.), *appeal dismissed*, 146 Ohio St. 694, 67 N.E.2d 713 (1946), that the manner of collecting a fine as it relates to the release of an offender from imprisonment has been "covered by state law" (OHIO GEN. CODE § 13451-15 (1938)) (now OHIO REV. CODE ANN. § 2847.20 (Page 1953)) so that an ordinance providing for a different method is in conflict and invalid. Two courts, Cincinnati v. Faig, 77 Ohio L. Abs. 449, 145 N.E.2d 563 (Cin. Mun. Ct. 1957); Columbus v. Kraner, 111 Ohio App. 484, 169 N.E.2d 44 (1960), have come to opposite conclusions as to the validity of an ordinance setting a longer period of time for the prosecution of offenses against an ordinance than that set by statute, OHIO REV. CODE ANN. § 1905.33 (Page 1953). The court in the former case sustained the ordinance as being analogous to providing for a greater penalty, while the latter court rejected this approach as to a longer statute of limitations when the statute is "directed toward the municipalities and places a limitation upon their actions . . . ." *Id.* at 487, 169 N.E.2d at 45. The *Parks* case has unfortunate overtones of preemption and the *Kraner* case raises a question of whether the statute involved is a "general law" in the constitutional sense. However, the first case and perhaps the other two cases relate to the judicial process and might be considered as coming within the exclusive power of the state over such matters. As such, the results, and to some extent the rationales, of the *Parks* and *Kraner* cases would be more acceptable than that of the *Faig* case.

[110] Matthews v. Russell, 87 Ohio App. 443, 95 N.E.2d 696 (1949), and *In re* Calhoun, 87 Ohio App. 193, 94 N.E.2d 388 (1949), involving OHIO CONST. art. I, § 9, the provisions of which forbid cruel and unusual punishment but which are not violated by the amount of the fine and the length of the term, but only by the kind of punishment imposed.

[111] Lindsay v. Cincinnati, 172 Ohio St. 137, 174 N.E.2d 96 (1961).

[112] Kistler v. Warren, 58 Ohio App. 531, 16 N.E.2d 948 (1938); Cincinnati v. Sandow, 40 Ohio App. 319, 179 N.E. 151 (1931).

[113] 168 Ohio St. 386, 154 N.E.2d 917 (1958).

[114] OHIO REV. CODE ANN. § 2923.01 (Page 1953). The statute provides that a violator could be "imprisoned in the penitentiary not less than one nor more than three years," while OHIO REV. CODE ANN. § 1.06 (Page 1953), provides that "Offenses

that the *Sokol* approach would not permit it to sustain the claim,[115] but it stated that the permit-prohibit test was not exclusive. Rather, it discerned a policy of the state to treat activities made felonies as matters with "penalties of a severe and lasting character",[116] while penalties for misdemeanors indicate less serious treatment. Admitting such an ordinance as was before the court might be of advantage to law enforcement, the court still concluded it could not permit a municipal corporation to make serious crimes into misdemeanors "and finally dispose of such offenses in the Municipal Court"[117] thus defeating the policy of the state. Until this case, differences between statutes and ordinances in the severity of the penalties prescribed had not resulted in a finding of conflict. The court, however, was not reaching an opposite conclusion, but rather it was drawing a line at the point of the differences in degree of offenses. This decision raises several policy issues. Two were mentioned by the court itself, namely, the policy of the state to treat activities made felonies as serious matters and the desire of the municipal authorities to advance law enforcement through the punishment of offenses of immediate concern to the well-being of the community at the local level. These conflicting considerations are not to be treated lightly. But an additional consideration involves the effect this approach will have on the *Sokol* rule in general.

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which may be punished by death or by imprisonment in the penitentiary are felonies; all other offenses are misdemeanors."

[115] In fact, the court in Youngstown v. Evans, 121 Ohio St. 342, 168 N.E. 844 (1929), and a companion case, *In re* Brown, 121 Ohio St. 342, 168 N. E. 844 (1929), seemed to find no conflict between statutes defining felonies and ordinances defining misdemeanors because they relate to different subject matters, one being a matter of statewide concern and the other being of local concern. In both these cases and in Lorain v. Petralia, 8 Ohio L. Abs. 159 (Lorain Mun. Ct. 1929), ordinances were sustained which prescribed different penalties from those prescribed by statute. A third offense was made a felony by the statute but was not the subject of the charges. Although dismissal of the affidavit was affirmed on other grounds, the court in Toledo v. Kohlhofer, 96 Ohio App. 355, 122 N.E.2d 20 (1954), sustained the validity of an ordinance even though it was almost a verbatim copy of OHIO GEN. CODE § 13035 (1938) (now OHIO REV. CODE ANN. § 2905.34 (Page Supp. 1966)), except that the statute made the act a felony. The Attorney General in 2 Op. Att'y Gen. 1539 (1919) expressed the opinion that the state's making an act a felony did not prevent a municipality from making the same act a misdemeanor.

[116] Cleveland v. Betts, 168 Ohio St. 386, 389, 154 N.E.2d 917, 919 (1958).

[117] *Id.* at 390, 154 N.E.2d at 919. This policy approach might well be a curious throwback to the early pre-amendment case of Canton v. Nist, 9 Ohio St. 439 (1859), in which the finding of a lack of municipal power arising from the failure of an ordinance to make the same exceptions that a regulatory statute did, was rested in part upon the concept of conflict with legislative policy.

How far is the concept of state "policy" freed from a "head-on collision" test likely to be carried? As we will see, it has not yet been expanded beyond the *Betts* case. But it now has life. The exclusiveness of the *Sokol* test, whether illusion or not, has been shattered. The expanded use in the future of an approach focusing upon conflict through different policies might be accepted if the *Betts* case constituted a clear gain, but does it? The case did accomplish the preservation of a state policy, yet, was it necessary to invalidate the municipal ordinance in order to achieve this result? The court rather cryptically concluded that it was, for otherwise the matter would have been finally disposed of as a minor one in the municipal court. Although the statute provides for "final determination" of a misdemeanor prosecution in the municipal court,[118] this would not preclude a subsequent state prosecution, since a municipal prosecution has been held to be no impediment to one conducted by the State.[119] Actual holdings of this nature are few, and the rationale is not clear,[120] but apparently the courts fail to find the doctrine of double jeopardy applicable and duplicate jurisdiction does no violence to the Home Rule Amendment. Is the court, by its suggestion in *Betts,* indicating an undercutting of its no double jeopardy stand? Or is it merely incorrect in seeing a danger in the municipality

[118] OHIO REV. CODE ANN. § 1901.20 (Page Supp. 1966).

[119] *See* Koch v. State, 53 Ohio St. 433, 41 N.E. 689 (1895). This result was reached despite the dictum in the uncited very early case of Wightman v. State, 10 Ohio St. 452 (1841), to the contrary.

[120] Dicta in the following cases support the proposition that prosecution by either the State or the municipality does not bar the other. However, in each the true issue was whether both could provide for punishment, which is the initial problem. Greenburg v. Cleveland, 98 Ohio St. 282, 120 N.E. 829 (1918); *In re* Smith, 14 Ohio N.P. (n.s.) 497 (C. P. 1913); Edis v. Butler, 8 Ohio N.P. 183 (C. P. 1900), *aff'd,* 68 Ohio St. 645, 70 N.E. 1119 (1903); Emery v. Elyria, 8 Ohio N.P. 208 (C. P. 1899). In Lorain v. Maraldi, 19 Ohio C.C.R. (n.s.) 58 (Cir. Ct. 1909), *aff'd,* 81 Ohio St. 539, 91 N.E. 1134 (1909) either could punish, and a larger municipal penalty was not against the policy of the State as a city might have particular need for it. *But see* 2 OP. ATT'Y GEN. 1539, 1541 (1919), indicating that double jeopardy would prevent a city from creating a felony. In Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519 (1923), double jeopardy was treated as a legislative problem, which could be solved by the State's barring its own prosecution after a city had prosecuted. In Wellsville v. O'Connor, 1 Ohio C.C.R. (n.s.) 253 (Cir. Ct. 1903), the dissent felt it necessary to interpret Koch v. State, 53 Ohio St. 433, 41 N.E. 689 (1895) as treating prosecution under an ordinance as being in the nature of a civil or quasi-criminal remedy for the collection of a fine in order to establish distinct offenses and avoid the conclusion of double jeopardy. The Ohio Supreme Court in State v. Shimman, 122 Ohio St. 522, 172 N.E. 367 (1930), in dictum, expressed the opinion that each of the three sovereignties, federal, state, and municipal, could punish offenses against the peace and dignity of each.

finally disposing of offenses considered serious by the State? If the former, some would certainly applaud,[121] although it is not clear that municipal authorities would be among them. On the other hand, if its fear was merely incorrect, what is left to support the conclusion reached? As a practical matter the State probably would not prosecute again an offense handled by a municipality, but so long as it could, how would the upholding of such an ordinance defeat the State's policy to treat certain matters seriously?

The principle announced in the *Betts* decision has been rapidly developed through judicial application. The supreme court itself was again faced with the problem in *Toledo v. Best*,[122] in which the defendant had been convicted of driving while intoxicated on a charge brought under an ordinance which did not require a minimum unsuspendable three-day jail sentence as does the statute.[123] The court found that conflict as to the degree of the crime which was an issue in Betts was not present in this case, and therefore it continued to follow *Sokol* on a matter which involved only the severity of the penalty.[124] The case is noteworthy for this refusal to extend the *Betts* ruling. Whether limited to penalties or applicable to the whole spectrum of conflict cases, the broader implication of *Betts* concerning invalidity through conflict with a state policy was not mentioned. Yet it could have been. The statute in issue had been specifically amended to provide for this minimum sentence[125] in face of statutory provisions which established that a judge has the discretion to fine or imprison if both are authorized

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[121] *See* Antieau, MUNICIPAL CORPORATION LAW § 4A.04 at 212.17 (1965). The courts in Toledo v. Best, 172 Ohio St. 371, 176 N.E.2d 520 (1961), *appeal dismissed*, 369 U.S. 657 (1962), and Toledo v. Kohlhofer, 96 Ohio App. 355, 122 N.E.2d 20 (1954), expressed the opinion that the only reason why ordinances which duplicate statutory provisions were adopted in the first place was to raise revenue, a purpose which the court in the former case thought no longer available because of changes in the law with respect to the distribution of fines and costs. One authority, however, sees in the power to provide for misdemeanors the meeting of an important municipal need. 6 McQuillin, MUNICIPAL CORPORATIONS § 23.12 (3rd ed. 1949).

[122] 172 Ohio St. 371, 176 N.E.2d 520 (1961).

[123] OHIO REV. CODE ANN. §§ 4511.19, .99(B) (Page Supp. 1965).

[124] In an earlier trial court decision, Toledo v. Ransom, 84 Ohio L. Abs. 12, 169 N.E.2d 657 (Lucas County Mun. Ct. 1960), the same municipal ordinance was found to be unconstitutional, not on the ground of a conflict of penalty despite *Sokol*, but because it permitted what the statute forbade, namely, the exercise of judicial discretion. The court went on to reject the idea that the *Betts* case was limited to a felony-misdemeanor conflict, but it did not refer to or develop a conflict of policy approach.

[125] 125 OHIO L. 461 (1953).

by statute[126] and he has in his discretion the power to suspend a sentence.[127] A state policy specifically directed at special treatment for drunk driving offenses was outlined. Although the court did not mention this state policy, it ended its opinion with the observation that the clinching argument against existence of a conflict was the fact that the defendant could have been given the same sentence under the statute as he was given under the ordinance. A three-day jail sentence had been imposed without suspension. Of course, *Betts* was not concerned with whether the State might have given as light a sentence as the city but rather with whether the city was capable of treating the crime as severely as the State. Viewed in this light the court's statement in *Toledo v. Best* indicates that the very nature of the conflict present in *Betts* was not present in this case. But this overlooks the type of conflict that was present; the State could not treat the charge here as lightly as the city could have althought it did not. Does this amount to a conscious effort on the part of the court to recognize policy considerations and to draw a distinction between a situation in which the city could not follow the state policy and one in which it might not follow? Or, does its explicit reliance on Sokol amount to a rejection of all policy considerations and a reduction of *Betts* to merely a specific rule applicable only to the felony-misdemeanor relationship?[128] If the latter, its danger to state-municipal relationships in the area of police regulations, although still formidable, is greatly reduced and is entirely eliminated as to matters outside of the penalty area.

It would seem then, that *Betts* at least for the present time stands only as a narrow exception to the *Sokol* rule.[129] Despite doubts previously expressed as to the necessity of such a distinction, it does not constitute a purely arbitrary classification in the penalties area since more than just increased or potentially increased severity of sentence is involved. As the court noted in *Betts,* a felony carries with it constitutional procedural safeguards, such as indictment by grand jury,[130] and its consequences are of a permanent character through the loss of citizenship rights.

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[126] OHIO REV. CODE ANN. § 2947.10 (Page 1953).

[127] OHIO REV. CODE ANN. § 2927.13 (Page 1953).

[128] Perhaps a third alternative is more likely in view of the actual opinion of the court: that the court simply failed to consider the policy issues involved and viewed the case as a *Sokol* type penalties one.

[129] *See* Columbus v. Glascock, 117 Ohio App. 63, 189 N.E.2d 889, *appeal dismissed,* 174 Ohio St. 9, 185 N.E.2d 437 (1962) (dictum).

[130] OHIO CONST. art. I, § 10.

A municipal court[131] has taken the broader implications of *Betts* at face value in striking down an ordinance involving traffic light and speeding offenses as being in conflict with a statute which declared that state statutes dealing with these and other traffic offenses, omitting load and equipment violation penalties, were to "be applicable and uniform throughout this state in all political subdivisions and municipal corporations therein, and no local authority shall enact or enforce any rule or regulation in conflict with such sections."[132] Although a conflict simply as to penalties was recognized as insufficient to invalidate under the *Sokol* rule and no felony was present, the court construed the above statute in light of increasing need for uniform traffic regulations as amounting to an expression of state policy under the *Betts* approach with which the ordinance could not conflict by prescribing greater penalties than those provided by statute. However, this same statute in an appeals decision was held to be no more than a restatement of the Home Rule Amendment prohibition against conflict as interpreted by the *Sokol* case.[133]

Aside from the question of the possible expansion or contraction of the *Betts* rule, it has received elaboration through judicial application. *Betts* did not change the old approach that there is no conflict if the ordinance makes a crime of activity which differs from that prohibited by statute. Therefore, the courts have required that the ordinance and the statute define the same crime before there can be a conflict.[134] Sufficient identity of terms to constitute the same subject matter has been found even though an antigambling ordinance covered broader gambling transaction con-

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[131] Hiram v. Conner, 85 Ohio L. Abs. 161, 173 N.E.2d 408 (Ravenna Mun. Ct. 1960).

[132] OHIO REV. CODE ANN. § 4511.06 (Page Supp. 1965).

[133] Columbus v. Glascock, 117 Ohio App. 63, 189 N.E.2d 889, *appeal dismissed*, 174 Ohio St. 9, 185 N.E.2d 437 (1962).

[134] Akron v. White, 92 Ohio L. Abs. 247, 194 N.E.2d 478 (Akron Mun. Ct. 1963), which held an ordinance forbidding carrying certain describing weapons constituted a different crime from OHIO REV. CODE ANN. § 2923.01 (Page 1953), which is limited to concealed weapons. *See* Cincinnati v. Coy, 115 Ohio App. 478, 182 N.E.2d 628 (1962), which held the presence of a scienter requirement in an ordinance prohibiting the sale of obscene literature that was omitted in OHIO REV. CODE ANN. § 2905.34 (Page Supp. 1966) did not make it a different offense; Hicks v. Akron, 87 Ohio L. Abs. 530, 181 N.E.2d 270 (Ct. App. 1961), which held an ordinance which prohibited the sale of any article "which may be used for the prevention of conception," did not differ from former OHIO REV. CODE ANN. § 2905.34 (Page Supp. 1964) which prohibited the sale of an article "intended for the prevention of conception".

tingencies than the statutes,[135] but in the same case the court found no identity when the charge under the ordinance was for a first offense while the statute made only a second offense a felony. On the other hand, an appeals court[136] and a municipal court [137] seem to have come to opposite conclusions as to whether the fact that the ordinance was broader than but might still be applied to the statutory situation provided the proper basis for the application of the *Betts* rule.

The ruling in the *Betts* case with one sweep invalidates all municipal ordinances which make the same acts misdemeanors that have been made felonies by state statute. The importance of this statement is made even clearer when one looks at the relatively few cases that have been decided and sees the areas in which it has already been held that a municipality cannot enter. They include aggravated assault,[138] the sale of contraceptives,[139] exhibiting obscene literature for sale,[140] and the malicious destruction of property.[141] If the municipal court case mentioned before[142] is considered authoritative, the whole spectrum of traffic violations would have to be added. In considering the effect of this ruling it is not inappropriate to note that of the nine cases directly relating to this point all but one have originated from the largest cities of the State. What effect the ruling is having on local law enforcement in these large cities during an era of increased crime deserves some thoughtful consideration and investigation.

III. Conflict "with General Laws"

As has been seen, the source of the power of a municipal corporation in Ohio prior to 1912 was legislation passed by the

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[135] Cleveland v. Jones, 89 Ohio L. Abs. 353, 184 N.E.2d 494 (Ct. App. 1962).

[136] Akron v. Vitoratos, 118 Ohio App. 98, 193 N.E.2d 434 (1963). Even though the amount was not charged in the affidavit, an ordinance which defined malicious destruction of property as a misdemeanor without any monetary limits was found to conflict with Ohio Rev. Code Ann. § 2909.01 (Page 1953) which makes it a felony if the value of the property is $100 or more.

[137] Akron v. White, 92 Ohio L. Abs. 247, 194 N.E.2d 478 (Akron Mun. Ct. 1963).

[138] Columbus v. Montanez, *appeal dismissed,* 171 Ohio St. 499, 172 N.E.2d 304 (1961), *noted in* ed. note, 14 Ohio Op. 2d 401.

[139] Hicks v. Akron, 87 Ohio L. Abs. 530, 181 N.E.2d 279 (Ct. App. 1961).

[140] Cincinnati v. Coy, 115 Ohio App. 478, 182 N.E.2d 628 (1962).

[141] Akron v. Vitoratos, 118 Ohio App. 98, 193 N.E.2d 434 (1963).

[142] Hiram v. Conner, 85 Ohio L. Abs. 161, 173 N.E.2d 408 (Ravenna Mun. Ct. 1960).

General Assembly.[143] If the enabling act contained an exception an ordinance passed under it was invalid as being beyond municipal power unless it contained the same exception.[144] If it provided for the penalty that could be imposed, the city could exact no other.[145] But with the adoption of the Home Rule Amendment municipalities are in general no longer dependent upon legislation to enable them to act. Municipalities are authorized to exercise all powers within their interests and territorial limits which the legislature could, so long as police regulations do not conflict with general laws.[146] Yet the laws passed by the legislature still play an important role in state-municipal relations. In addition to their supremacy in the area of police regulations, state statutes also prevail under current theory[147] in providing for the structure of municipal government, as well as the rules of government for noncharter municipalities.[148] Whatever constitutes "general laws" with which the municipal police regulations cannot conflict, they are not laws within the legislative competence which deal with local self-government problems but rather those which deal with police matters. Further, they are not laws dealing with power as such. The generality of power has been conferred upon municipal corporations by other provisions of the amendment, either by the local self-government clause,[149] or that clause in conjunction with the police regulation clause. As they do not include enabling laws, "general laws" do not encompass legislative efforts to restrict power granted to the municipal corporation by the people through their constitution, unless that constitution so provides. The only express limitation upon municipal Home Rule is the "no conflict" provision. As has already been seen, the provision has not been construed to authorize the state to exclude a municipality from a field by means of the state's own regulation of the field—to preempt the field. It would seem even more clear that this provision is not to be construed as justifying a simple denial of

[143] Bloom v. Xenia, 32 Ohio St. 461 (1877).

[144] *See* Akron v. Seitz, 18 Ohio C.C.A. (n.s.) 200 (Cir. Ct. 1908).

[145] Caskey v. Belle Center, 8 Ohio N.P. (n.s.) 153 (C.P. 1908); BATES OHIO STATS. § 1536-182 (1897) (now OHIO REV. CODE ANN. § 723.48 (Page 1953)).

[146] Statutory grants remain necessary to authorize a municipality to act extraterritorially or on matters which are not municipal. Prudential Co-op. Realty Co. v. Youngstown, 118 Ohio St. 204, 160 N.E. 695 (1928).

[147] Leavers v. Canton, 1 Ohio St. 2d 33, 203 N.E.2d 354 (1964); State *ex rel.* Petit v. Wagner, 170 Ohio St. 297, 164 N.E.2d 574 (1960).

[148] OHIO CONST. art. XVIII, § 2.

[149] Benjamin v. Columbus, 167 Ohio St. 103, 146 N.E.2d 854 (1957), *cert. denied,* 357 U.S. 904 (1958).

power. Moreover, so to construe it would create the incongruous situation of retaining in a large area of municipal affairs a two step legislative enabling power, through withdrawal and rebestowal. Rather than establishing self-government, this interpretation of the amendment would make the position of the municipality worse than it had been before, as it would subject it to the necessity of running the gauntlet of interpretation twice. Then too, if this was intended, the language used, "not in conflict with general laws," seems inappropriate in comparison with what might have been used, such as, "except as denied by the legislature" or, even, "to the extent granted by the legislature." The phrase used is much more consistent with an interpretation which recognizes the retention of legislative supremacy in the area of police regulations than it is with one which envisons a retention of the authority to deny and bestow power.

A. *Meaning of the Phrase "General Laws"*

The courts have at times spoken of a "withdrawal" of power from a municipality, or that the only power the municipality has is that conferred by the legislature. Three observations may be made about such cases. First, some can be explained as being involved with powers left by the constitution in the State because they were never granted to the municipality in the first place. They are neither matters of local self-government nor of police regulations, such as control over public schools[150] or the creation of courts and attendant procedures.[151] Second, most were primarily concerned with the question of the power of the State to act; having determined this, usually there was no necessity for the courts to go further and speak of a withdrawal of power from the municipality.[152] Finally, if these cases represent a separate theory of power its theoretical basis is not clear, and it has not received general application in that it has been

[150] Niehaus v. State *ex rel.* Bd. of Educ., 111 Ohio St. 47, 144 N.E. 433 (1924).

[151] Columbus v. Kraner, 111 Ohio App. 484, 169 N.E.2d 44 (1960). This is a possible explanation for the case which involved the question of a statute of limitations for the prosecution of offenses against municipal ordinances. The court, however, found the statute, OHIO REV. CODE ANN. § 1905.33 (Page 1953), to be a general one at the same time that it found conflict between it and an ordinance because the statute was construed to be a limitation on the power of the municipality.

[152] *See* State *ex rel.* Mowrer v. Underwood, 137 Ohio St. 1, 27 N.E.2d 773 (1940); Bucyrus v. Dep't of Health, 120 Ohio St. 426, 166 N.E. 370 (1929); Bd. of Health v. State *ex rel.* O'Wesney, 40 Ohio App. 77, 178 N.E. 215 (1931).

limited to matters of statewide concern, particularly health[153] and, temporarily, police and fire departments.[154] Nor could Home Rule, as it has been known in Ohio, long survive if the theory received wider application.

Although the "no conflict" provision does not authorize the State to deny power to the municipality, nothing prevents the State in the exercise of its general powers to grant additional authority to a municipality through making the "no conflict" provision inoperative. This result has in fact been reached with respect to zoning procedures established by statute.[155] It might be questioned, however, whether these procedural statutes are "general laws" with which a municipality could not have otherwise been in conflict or whether they deal with a matter properly within the meaning of "police regulations."

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[153] Bucyrus v. Dep't. of Health, 120 Ohio St. 426, 166 N.E. 370 (1929); Hickey v. Burke, 78 Ohio App. 351, 69 N.E.2d 33, *appeal dismissed*, 147 Ohio St. 217, 70 N.E.2d 274 (1946).

[154] Smith v. Mayfield Heights, 63 Ohio L. Abs. 483, 108 N.E.2d 861 (C.P. 1952).

[155] "General Code, Section 4366-12, yields unrestricted powers to municipalities in respect to zoning, if such powers are granted by the [municipal] charter." Bauman v. State *ex rel.* Underwood, 122 Ohio St. 269, 270, 171 N.E. 336 (1930).

> Nothing contained in the foregoing sections 4366-7 to 4366-11 inclusive shall be deemed to repeal, reduce, or modify any power granted by law or charter to any municipality, council or other legislative body of a municipality nor to impair or restrict the power of any municipality under Article XVIII of the Constitution of Ohio. OHIO GEN. CODE § 4366-12 (1938) (now OHIO REV. CODE ANN. § 713.14 (Page Supp. 1966)).

Another type of state statute imposes a duty upon a municipality. Here too the problem of general laws arises. The court in Wilson v. East Cleveland, 121 Ohio St. 253, 167 N.E. 892 (1929), apparently assumed such a law was involved when it found an ordinance, which attempted to limit municipal liability for failure to perform its statutory duty to keep its streets open, in repair, and free from nuisance, invalid because of conflict (*see* OHIO REV. CODE ANN. § 723.01 (Page 1953)). Since this statute has been construed to impose liability upon a defaulting city in favor of an injured party properly within its scope, it might be said to partake of the nature of a regulation of the streets in two respects. One, it grants to users protection from certain types of hazards, and two, it regulates indirectly against those hazards, both those municipally created and those created by private persons. Viewed in this light, it can be argued that such a law meets the requirement that in order to be a "general law" a statute must prescribe rules of conduct for citizens. It is distinguishable from a situation in which an implied permission for citizens to act was found to arise from a statute which forbade the municipality to regulate as was present in Schneiderman v. Sesanstein, 121 Ohio St. 80, 167 N.E. 158 (1929), with respect to OHIO GEN. CODE § 12608 (1938). Not all such duty-imposing statutes can be so construed. In any case, such statutes do not suffer from the same infirmity as power-denying statutes do, that of attempting to limit the constitutionally conferred municipal police power. *See also*, Gerspacher v. Cleveland, 21 Ohio Op. 537 (C.P. 1941).

General laws, then, must be laws dealing with police regulation general in nature, that is, applying uniformly throughout the State, of more than local concern, and prescribing rules of conduct for citizens as distinguished from municipal corporations. The supreme court has taken this approach, largely by way of dicta, to formulate a definition of "general laws."[156] Also, "general laws" does not mean common law, but laws enacted by the legislature. For example, a city was free to impose a greater duty of care than would otherwise be expected upon drivers of streetcars who come upon another loading or unloading streetcar.[157] On the other hand, the court, over objection,[158] duly authorized administrative regulations as having the force of law and therefore as being "general

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[156] [T]he general laws referred to are obviously such as relate to police, sanitary and other similar regulations, and which apply uniformly throughout the state. They involve the concern of the state for the peace, health and safety of all of its people, wholly separate and distinct from, and without reference to, any of its political subdivisions—such as regulate the morals of the people, the purity of their food, the protection of the streams, the safety of buildings and similar matters.

Fitzgerald v. Cleveland, 88 Ohio St. 338, 359, 103 N.E. 512, 517-18 (1913).

Section 6307, General Code, specifically provides that local authorities shall not regulate the speed of motor vehicles by ordinance, by-law, or resolution. It is sufficient to say that the general assembly of Ohio cannot deprive a municipality of its constitutional rights.

Fremont v. Keating, 96 Ohio St. 468, 470, 118 N.E. 114 (1917).

[I]f there were a statute creating the same offense, it could not be exclusive, even if the general assembly of Ohio in express terms prohibited the municipality from legislating upon the same subject matter.

Greenburg v. Cleveland, 98 Ohio St. 282, 286, 120 N.E. 829, 830 (1918).

Section 3628 is a general law in the limited sense that it operates uniformly throughout the state. It is not a general law in the sense of prescribing a rule of conduct upon citizens generally. It is a limitation upon law making by municipal legislative bodies.

Youngstown v. Evans, 121 Ohio St. 342, 345, 168 N.E. 844, 845 (1929).

[157] Leis v. Cleveland Ry., 101 Ohio St. 162, 128 N.E. 73 (1920); *accord,* State *ex rel.* Arey v. Sherrill, 142 Ohio St. 574, 53 N.E.2d 501 (1944); Schwartz v. Youngstown, 27 Ohio L. Abs. 229 (Ct. App. 1938). The *Leis* case would seem to negate the suggestion that a municipality cannot enter the area of private law which was offered in Fordham & Asher, *Home Rule Powers in Theory and Practice,* 9 OHIO ST. L. J. 18, 60 (1948), as an explanation for the result reached in Wilson v. East Cleveland, 121 Ohio St. 253, 167 N.E. 892 (1929), that a city could not condition its statutory duty to keep its streets open, in repair, and free from nuisance. *See generally* Comment, *The Power of Ohio Municipalities to Enact Private Law,* 9 OHIO ST. L.J. 152 (1948).

[158] *See* Lorain Street R.R. v. Public Utilities Comm'n, 113 Ohio St. 68, 148 N.E. 577 (1925) (concurring opinion).

laws."[159]

B. *Regulation of the Conduct of Citizens*

Drawing a line between denying power to a municipal corporation and regulating the conduct of citizens, as the definition of "general laws" requires be done, is not always a simple process. An examination of judicial treatment of a number of statutes which have raised or could have raised this issue will demonstrate this point. Section 3628, OHIO GEN. CODE, permitted municipalities

> To make the violation of ordinance a misdemeanor, and to provide for the punishment thereof by fine or imprisonment, or both, but such fine shall not exceed five hundred dollars and such imprisonment shall not exceed six months.[160]

This statute has been involved in the decision of a number of cases, including *Youngstown v. Evans.*[161] Although in this case the fine actually assessed was within the limits established by the statute, the court concluded that, even though the statute was general in the sense that it was applicable uniformly throughout the State it was not a regulation of the conduct of citizens generally. Instead, it was only a limitation upon municipal legislative power and therefore not a general law within the meaning of the Home Rule Amendment. The court stated further:

> Section 3628, General Code, is not a law defining offenses and prescribing the punishment therefor, and is not therefore effective to bring an ordinance purporting to define and punish offenses in conflict with Section 3, Article XVIII, of the Constitution.[162]

This expression came only after several lower courts had assumed the statute's validity, the appeal from one of which was dismissed by the supreme court.[163] But one appeals court had anticipated the

[159] Neil House Hotel Co. v. Columbus, 144 Ohio St. 248, 58 N.E.2d 665 (1944); Lorain Street R.R. v. Public Utilities Comm'n, 113 Ohio St. 68, 148 N.E. 577 (1925); Coshocton v. Saba, 55 Ohio App. 40, 8 N.E.2d 572 (1936).

[160] Now OHIO REV. CODE ANN. § 715.67 (Page 1953).

[161] 121 Ohio St. 342, 168 N.E. 844 (1929).

[162] *Id.* (syllabus 2).

[163] Brannon v. Wilmington, 31 Ohio App. 307, 165 N.E. 311, *appeal dismissed,* 119 Ohio St. 652, 166 N.E. 199 (1928) (although the fine assessed was less than statutory limits, the ordinance which exceeded was invalidated); Magris v. Canton, 22 Ohio N.P. (n.s.) 312 (C.P. 1919); *In re* Sherlock, 19 Ohio N.P. (n.s.) 302 (C.P. 1916). In the last two cases OHIO GEN. CODE § 3628) (1938) was considered and the ordinances in each instance were found to be within its limits.

result of *Evans,* at least with respect to charter cities.[164] Since this decision, the statutory provision has been treated as ineffective to restrict the municipality in prescribing penalties for misdemeanors.[165] This same result was reached subsequently with respect to a similar statute,[166] again, however, only after a false start.[167]

The statements of the court in *Evans,* and particularly that made in the quoted portion of the syllabus, lead to a further question. Although a power-granting statute containing a limitation such as section 3628 is unnecessary as a grant of power and ineffective as a denial of it, could a prohibition against further regulations or against the imposition of greater penalties by a municipal corpora-

[164] Marko v. Youngstown, 6 Ohio L. Abs. 477 (Ct. App. 1928).

[165] *See* Matthews v. Russell, 87 Ohio App. 443, 95 N.E.2d 696 (1949); *In re* Calhoun, 87 Ohio App. 193, 94 N.E.2d 388 (1949); Kistler v. Warren, 58 Ohio App. 531, 16 N.E.2d 948 (1938).

[166] OHIO GEN. CODE § 3664 (1938) (now OHIO REV. CODE ANN. § 715.55 (Page 1953)) granted power to municipal corporations to punish disturbance of the peace in addition to other misconduct. OHIO GEN. CODE § 3665 (1938) (corresponding to OHIO REV. CODE ANN. § 715.56 (Page 1953)) provided:

> Punishment of breaches of peace.— Such punishment may be by imposing and collecting fines, or by imprisonment in the proper jail or workhouse at hard labor, or both, at the discretion of the court, but no such person shall be fined for a single offense to exceed fifty dollars. Such imprisonment and hard labor shall not, for the first offense, exceed thirty days, for the second offense, ninety days, for the third offense six months, and for the fourth or any further repetition of the offense, one year.

Following Youngstown v. Evans, 121 Ohio St. 342, 168 N.E. 844 (1929), the court in Leipsic v. Folk, 38 Ohio App. 177, 176 N.E. 95 (1931), held the above statute did not invalidate an ordinance which exceeded its limits although the fine imposed did not.

[167] Morris v. Conneaut, 20 Ohio N.P. (n.s.) 289 (C.P. 1917). Although the fine did not exceed the limits of the statute, authorization by ordinance to impose more was thought to have influenced the trial court in assessing the fine, so the conviction of the defendant was reversed and the ordinance voided.

The statutory limitations placed upon the grant of authority to municipal corporations to regulate the speed of railroad cars within corporate limits—"such ordinance shall not require a less rate of speed than four miles an hour, and in villages having a population of two thousand or less, it shall not require a less rate than eight miles an hour," OHIO GEN. CODE § 3781 (1938) (now OHIO REV. CODE ANN. § 723.48 (Page 1953))—were assumed to be effective in a series of cases in which ordinances that did not exceed these limits were involved. The courts used these limitations as an aid in determining the constitutionality of the ordinances, finding conformity created a presumption of reasonableness and validity. Baltimore & O. R.R. v. DeLeone, 289 F. 201 (6th Cir. 1923); Cleveland, C. C. & St. L. Ry. v. Grambo, 103 Ohio St. 471, 134 N.E. 648 (1921); Bender v. New York Cent. R.R., 3 Ohio App.2d 150, 209 N.E.2d 589 (1963); Banks v. Baltimore & O. R.R., 76 Ohio L. Abs. 83, 145 N.E.2d 350 (C.P. 1957).

tion accompany a state regulatory statute and thereby be treated as a regulation of conduct and thus as a general law? The *Evans* syllabus might be interpreted to give support to such a proposition, provided the provisions could be said to define and punish offenses. In a case decided before *Evans*,[168] the court in dictum expressed the opinion that a statute[169] which denied municipalities the power to set speed limits was invalid. It did not construe this statute together with a widely separated state speed regulating statute. There is no reason to suggest any different result with respect to a regulatory statute which itself contains such a provision.[170] Essentially, the question remains whether such provisions are a denial of power or a regulation of conduct. The location of a denial in the statutes should make no difference. Moreover, a denial is not really the defining of a crime or the prescribing of a penalty. By application of the "no conflict" provisions of the Home Rule Amendment, a regulation of conduct or "general law" is not characterized by its exclusion of municipal action. Rather, it can only serve to prevent a municipality from validly enacting conflicting ordinances. This has meant that municipal regulations which are coincident with or are more or less restrictive than state statutes are not invalid. Preemption by the State, based on the power to exclude, has generally been held to have no place in the area of municipal police regulations. Yet treating a statute as a regulation of conduct which precludes any other regulation or denies the imposition of any greater penalty would be to permit it to go beyond the role of a regulation, creating an area of exclusiveness and reducing municipal power. It would broaden the use of the concept of "general laws" to permit what

[168] Fremont v. Keating, Ohio St. 468, 118 N.E. 114 (1917).

[169] Local authorities shall not regulate the speed of motor vehicles by ordinance, by-law or resolution . . . . The term 'local authorities' as used herein, means all officers, boards, and committees of counties, cities, villages or townships. OHIO GEN. CODE § 6307 (1945).

[170] In several additional cases involving regulatory statutes containing similar limitations to those just discussed courts have either ignored them, Klein v. Cincinnati, 33 Ohio App. 137, 168 N.E. 549 (1929), obstensibly accepted them as general laws, but with the decisions actually resting on other grounds, State *ex rel.* McElroy v. Akron, 173 Ohio St. 189, 181 N.E.2d 26, *appeal dismissed*, 371 U.S. 35 (1962), interpreting OHIO REV. CODE ANN. § 1547.61 (Page 1953); Globe Security & Loan Co. v. Carrel, 106 Ohio St. 43, 138 N.E. 364 (1922) (susceptible of being put on another ground); Noland v. Sharonville, 4 Ohio App.2d 7, 211 N.E.2d 90 (1964), involving OHIO REV. CODE ANN. § 3733.07 (Page 1953), or at least presented an alternative ground, Cleveland Elec. Illuminating Co. v. Painesville, 10 Ohio App.2d 85, 226 N.E.2d 145 (1967), involving OHIO REV. CODE ANN. § 4905.65 (Page Supp. 1966). None represents a clear-cut holding contrary to the conclusion stated in the text.

judicial interpretation of the "no conflict" provision has found the framers of the Home Rule Amendment never intended.[171]

A series of cases have been decided in which section 12608, OHIO GEN. CODE, has played a part:

> The provisions of § 12603 shall not be diminished, restricted or prohibited by an ordinance, rule or regulation of a municipality or other public authority.[172]

Section 12603, OHIO GEN. CODE, referred to in the above statute imposed traffic regulations primarily dealing with speed. The quoted section was considered in two early lower court cases, causing the invalidation of an ordinance in one,[173] while in another the ordinance was found not to violate its provisions.[174] This statute became of crucial importance in the decisions in the companion cases of

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[171] Perhaps there is a middle position between denial of power and regulation which could still properly be placed within legislative competence, that of the definition of municipal power. Such an approach is at least suggested by the result, if not the opinion, of the court in Cleveland Elec. Illuminating Co. v. Painesville, 10 Ohio App. 2d 85, 226 N.E.2d 145 (1967). In ruling on the validity of a regulatory ordinance, an appeals court had before it a prior 4-3 decision of the supreme court in State *ex rel.* Cleveland Elec. Illuminating Co. v. Euclid, 169 Ohio St. 476, 159 N.E.2d 756 (1959), *appeal dismissed,* 362 U.S. 457 (1960), in which the reasonableness of a similar ordinance requiring the underground installation of electric lines carrying over 33KV had been sustained. It also had to consider a subsequently passed statute, OHIO REV. CODE ANN. § 4905.65 (Page 1953). Despite resort to varying theories, the court ultimately found the ordinance unreasonable when applied to utility lines which were constructed according to accepted safety standards. In one view it might be said that the court was considering the statute as a legislative definition of what was reasonable — as a definition of municipal power. Such definition, absent arbitrariness, is superior to the judgment of the court, just as that of the council was. However, is it superior to that of the council? The statute may delimit a power which is the subject of conflicting opinions even on the supreme court, but from what source does the state receive the authority to define municipal power granted by the constitution? It may not be a denial of substantive power in that the legislative judgment of what is reasonable might be the most accurate, but it would nonetheless constitute a limitation upon the power of the council to make such a determination. It would seem, therefore, that even if a statute were described as a definition of municipal power it would in reality be a denial since it would deprive a council of the authority to determine the scope of its power through its exercise, subject to judicial review to prevent abuse.

[172] OHIO GEN. CODE § 12608 (1938), *repealed,* 119 OHIO L. 776, § 112 (1941).

[173] F. D. Lawrence Elec. Co. v. Enterprise Lumber Co., 28 Ohio App. 30, 162 N.E. 434 (1924).

[174] Reed v. Hensel, 26 Ohio App. 79, 159 N.E. 843 (1927): adding in an ordinance to the language of the statute that a driver was not to drive "so as to endanger the property, life or limb of any person," and making driving over the stated speed "presumptive" evidence of unreasonableness rather than *"prima facie"* as was stated in the statute, did not "diminish, restrict or prohibit" its provisions.

Schneiderman v. Sesanstein[175] and *Eshner v. Lakewood.*[176] The court in each case developed "conflict by implication" by finding an implied permission to lawfully drive up to the speed of twenty-five miles per hour flowing from the provision of section 12603 making it prima facie unlawful to drive above that speed. In each case, however, the court clinched its conclusion by resort to the provisions of section 12608. Insofar as that section merely prohibits any conflict with the provisions of section 12603 it poses no problem for our consideration here, since this would make it a mere repetition of the requirements of the "no conflict" provisions of the Home Rule Amendment. If conflict by implication is the true basis of the decisions and is thereby firmly established, then the greater restriction on municipal power will have been achieved as a consequence of a broadening of the "no conflict" interpretation, not as a consequence of a denial of power. Section 12608 will have been treated as a redundancy. However, the court used both sections to reach its results, recognizing a lack of state power of denial but interpreting section 12608 as not constituting such a denial. In other words, section 12603 was prohibitory interpreted to impliedly permit, while under section 12608 the "no diminishing" provision was also interpreted to amount to a permission to citizens to act.

Having reached this result once, to do it again would appear to be of little consequence. But this approach bears within it the seeds of exclusiveness rather than mere permission. To apply it to a statute which is unrelated to a regulation as was involved in the *Evans* case[177] would be to change the result there by merely changing the labels. Even to apply it in a situation such as was present in both *Schneiderman* and *Eshner* can easily lead to misconstruction.[178]

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[175] 121 Ohio St. 80, 167 N.E. 158 (1929).

[176] 121 Ohio St. 106, 166 N.E. 904 (1929).

[177] Youngstown v. Evans, 121 Ohio St. 342, 168 N.E. 844 (1929).

[178] Some recent support has been given to the permission approach by an appeals court in the case of Cleveland Elec. Illuminating Co. v. Painesville, 10 Ohio App. 2d 85, 226 N.E.2d 145 (1967), despite a minimum of discussion and the advancement of several other theories for invalidating the ordinance. Although the exclusionary language of the statute involved, OHIO REV. CODE ANN. § 4905.65 (Page 1953), is less strong than that contained in OHIO GEN. CODE § 12608, probably of greater influence upon the court was the more detailed description of the area barred to municipal regulation. For, it would seem, the more particulars this contains, the more difficult it is, and perhaps the more questionable it is to try, to distinguish a power denying statute from a regulatory one. Nevertheless the question still is ultimately one of whether the legislature is in fact regulating citizens by impliedly permitting activity within the detailed area of proscribed municipal regulation. Again, such does not truly seem to be

Aside from such misgivings and even though its presence might have influenced the court greatly in developing the theory of conflict by implication as to a partial refutation of the "head-on collision" test, its application in these cases is no more restrictive of municipal power than conflict by implication alone would have been.[179]

Essentially the same problem, except in a more current setting and involving the more modern theory of conflict through differing policies, was presented in two lower court decisions. A municipal court in the case of *Hiram v. Conner*[180] apparently construed a "no-conflict" statutory provision[181] as amounting to something more than a mere repetition of the constitutional prohibition. Although it did not ignore the limitations imposed by the *Evans* case against a denial of power, it avoided finding a violation of them by deciding the statute involved was part of a regulatory measure which defined a crime and prescribed the punishment therefor. It went on to treat the statute as constituting an expression of legislative policy advancing the modern need for uniform traffic enforcement within the *Betts* felony-misdemeanor conflict rule, without which it would have been unable to find a conflict since a difference be-

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the case. If it is intended to have such a statute serve the regulatory purpose of gaining compliance with statutory standards, this is never likely to be fully accomplished since it can only be successful to the extent that municipal regulations exist and citizens have reason to seek to avoid them. It is also very unlikely that such a statute would even be considered in the construction of either prior or subsequent state statutes clearly regulating these same citizens.

[179] In a recent case, Union Sand & Supply Corp. v. Fairport, 172 Ohio St. 387, 176 N.E.2d 224 (1961), the court not only seemed to interpret the emphasis of the *Schneiderman* decision to rest on § 12608, as mentioned earlier, but it appeared to be critical of the decision in Froelich v. Cleveland, 99 Ohio St. 376, 124 N.E. 212 (1919), which involved the authority of the municipality to impose weight limits on vehicles using their highways, because it had not given the same importance to a statute, OHIO GEN. CODE § 7250 (1938, similar to OHIO GEN. CODE § 12608 (1938), that the court of the *Schneiderman* case had given to that section. For view that the limitations of § 12608 were not applicable to a municipality since it was not a general law *see* Comment, *The Status of the Police Power of Ohio Municipalities to Enact Criminal Ordinances,* 14 W. RES. L. REV. 786, 794 n.48 (1963).

[180] 85 Ohio L. Abs. 161, 173 N.E.2d 408 (Ravenna Mun. Ct. 1960).

[181] Sections 4511.01 to 4511.78, inclusive, 4511.99 and 4513.01 to 4513.37, inclusive [Operation of Motor Vehicles and Equipment; Loads; Chapters] of the Revised Code shall be applicable and uniform throughout this state and in all political subdivisions and municipal corporations therein, and no local authority shall enact or enforce any rule or regulation in conflict with such sections.

OHIO REV. CODE ANN. § 4511.06 (Page 1965).

tween penalties imposed by ordinance and statute is not violative of the "head-on collision" test.[182]

In the case of *Columbus v. Glascock*,[183] dealing with the same statute, an appeals court found it merely repetitious of the constitutional prohibition. In answer apparently to a preemption argument, the court found the State could not deprive a municipal corporation of power directly or indirectly and preemption had no place in the police regulation field. Except for the *Betts* felony-misdemeanor approach, the *Sokol* "head-on collision" test was applicable.[184] These two cases, although not finally determinative of the issue presented in this section, serve graphically to illustrate it and to bring into focus the problem of its relationship to the *Betts* rule.

Again, if no more than a "no conflict" redundancy was meant by the legislature when it passed this statute no problem is presented. If more was intended, the court in the *Glascock* case concluded that it could not be achieved since the state had no power to preempt. But the *Conner* court saw an express policy within the meaning of the *Betts* rule. The first question raised is whether the *Betts* approach was intended to be extended beyond the felony-misdemeanor field. As will be recalled, *Toledo v. Best*[185] seems to suggest a negative answer. If it were to be given broader application, could it be used to avoid the rule against state denial of municipal power? The municipal court in the *Conner* case apparently disclaimed any such intention when, in distinguishing section 3628 involved in *Evans*, it described the instant limitation as not being general, but one related to particular crimes, and therefore, as part of the definition of a crime and the prescribing of a penalty therefor. The court thus attempted to fit its approach within the terms of the *Evans* language. But defining a provision as part of a statute which creates a crime ought not to save it from being considered as a denial of

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[182] *See also* Englewood v. Bettis, 15 Ohio L. Abs. 8 (Ct. App. 1933), *appeal dismissed*, 127 Ohio St. 504, 189 N.E. 4 (1933), (statute prohibiting traffic control devices without approval of highway director held valid as regulation by general law, not a denial of power).

[183] 117 Ohio App. 63, 189 N.E.2d 889, *appeal dismissed*, 174 Ohio St. 9, 185 N.E.2d 437 (1962).

[184] *See* Cleveland v. Sado, 43 Ohio L. Abs. 183, 61 N.E.2d 910 (Ct. App.) *appeal dismissed*, 146 Ohio St. 126, 64 N.E.2d 322 (1945) ,involved OHIO GEN. CODE § 6307-6 (1945), the predecessor of OHIO REV. CODE ANN. § 4511.06 (Page 1964). The court cited the *Schneiderman* case but seems to have simply made a liberal application of the *Sokol* "head-on collision" approach in upholding the ordinance.

[185] 172 Ohio St. 371, 176 N.E.2d 520 (1961), *appeal dismissed*, 369 U.S. 657 (1962).

power if it otherwise would amount to one, that is, if it restricts municipal authority more severely than the "no conflict" provisions of the amendment.

Such a more restrictive effect has been given to a statutory provision as a result of the court's decision in the *Conner* case, by the combining of a broader definition of "general laws" with the use of the *Betts* rule for finding a conflict. As the supreme cour tin *Schneiderman* and *Eshner* gave a similar effect to the provisions of section 12608 by finding in them a basis for conflict by implication, so the municipal court in *Conner* has reached that result by finding it an analogous statute a basis for conflict in policies.

Here lies the danger of the *Betts* case. It makes the determination of conflict and its accompanying effects depend upon the relatively unlimited power of both the legislature to express a policy and of the courts to find and interpret it. This still poses a considerable threat to municipal power even if it is limited to statutes regulating conduct, as in the Conner case. Such an expression of policy has been found in order to prevent the imposition by a municipality of a lesser penalty than that imposed by statute in the *Betts* case. The *Conner* court would use a no less significant express statutory statement to prevent a municipal imposition of a greater penalty. What is to prevent a court from accepting a statutory statement entirely prohibiting municipal regulation of subject matter? We would then have full blown preemption. There would be no denial of power; rather the "no conflict" provision would have been used as a substantial aid in the reduction of municipal power.

Of course, there is nothing sacred about the "head-on collision" test, nor is there anything inherently evil in the preemption doctrine. The possibility of the latter being applied is inherent in any division of power between two levels of government. There was nothing to prevent the court, at the time of the adoption of the amendment, from giving it a preemption-oriented interpretation, with only ambiguous precedent to prevent it from doing so now.

There remains, however, solace to Home Rule enthusiasts if not in the *Conner* decision then in the fact that the supreme court did not expand the *Betts* rule in *Toledo v. Best* so as to include other penalty situations. By ignoring policy considerations in *Best,* it has perhaps decided to forego that broad approach in the future. Yet if a case such as *Conner* were presented to the supreme court, or better still one involving a statute which more clearly evidences the legislative desire to establish a policy against greater municipal

penalties or the exclusion of municipal regulations, the court would not be in a position to ignore the policy issue. In that event the supreme court might very well fall back on the general course of decisions which preclude preemption, whether through the development of the "no conflict" doctrine, or through the rule that "general laws" do not include statutory denials of municipal power. Maintaining the line with respect to the meaning of "general laws" would prevent an encroachment on municipal power, but as the *Schneiderman* and *Conner* cases teach, this situation becomes more perilous for Home Rule when the assault is accompanied by a "conflict" attack.

C. *Effect of Grant of Power by Legislature to Municipalities*

At times the argument has been advanced that a grant of power by the legislature to the municipal corporations of the state implies an intent to take away that power not granted. This conclusion stems from the continued retention in the code of a wide variety of statutes granting power to municipal corporations passed before the adoption of the Home Rule Amendment. This problem is, however, one which should be easily answered in light of principles already treated in the above discussion.

The argument bears a resemblance to the doctrine of conflict by implication, which has received some acceptance by the courts in dealing with state regulatory measures. But this doctrine should not give any semblance of validity to contentions raised here. The issuehere is that of municipal power. According to the *Evans* case, the state cannot expressly deny power to the municipality. Surely an implied denial is no less invalid. The basis for this conclusion has been well stated by the supreme court in referring to an implied limitation of power.:

> This view, as we have seen, entirely ignores the very essential fact that the powers of municipalities are now conferred by the Constitution and not by Legislature.[186]

There are several cases in which this problem has been dealt with in this fashion.[187] However, in one trial court case the court

[186] Akron v. Scalera, 135 Ohio St. 65, 68, 19 N.E.2d 279, 280 (1938).

[187] Section 715.55, OHIO REV. CODE, is not a limitation on the right of a municipal corporation to enact legislation under its constitutional police power, and the part of the section quoted above appears to be needless legislation, as the municipality is empowered to legislate on the matters therein stated, as well as on other police matters not specifically authorized by state law.

Akron v. Criner, 112 Ohio App. 191, 193, 176 N.E.2d 746, 748 (1960); *accord*, Coshocton v. Saba, 55 Ohio App. 40, 8 N.E.2d 572 (1936). In Columbus Legal Amusement Ass'n v. Columbus, 50 Ohio L. Abs. 353, 79 N.E.2d 915 (Ct. App. 1947), al-

concluded that a statutory grant of power to the municipal corporation to regulate billboards acted as a recognition of them as a lawful business and limited the authority of the municipality to entirely prohibit them.[188] As has been noted, the supreme court has recently reaffirmed the proposition that a municipality has power from the Home Rule Amendment to prohibit as well as regulate.[189] An attempt first to find and then to sustain a denial of a prohibitory power should not receive favorable treatment from the courts.

By way of a resume of this section on "general laws," special attention will be devoted to the supreme court case of *West Jefferson v. Robinson*.[190] This case raises the whole subject of municipal regulation and prohibition of solicitors and peddlers going from house-to-house and using the public streets to carry on their business. The area is one in which courts have been almost uniform in developing a wrong approach to the "general laws" question, a situation which has hopefully been corrected by the *Robinson* case.[191]

This case involved the application of a traditional "Green River" ordinance, prohibiting unrequested door-to-door solicitation, to the activities of an encyclopedia salesman. The court distinguished precedent which had found constitutional objections to imposing a license fee upon merchants who did not use the public streets or places to conduct their business by noting that the ordinances then in issue were not limited in their restrictive force only to unrequested solicitation.[192] In dealing with the reasonable-

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though the court found no limits from the statutory grant of power in OHIO GEN. CODE §§ 3657-72 (1938) (now OHIO REV. CODE ANN. §§ 715.48-.63 (Page 1953)) to municipal corporations to license businesses, it looked for possible state intent to preempt the field. However, in Toledo, C. & O. R. R.R. v. Miller, 108 Ohio St. 388, 140 N.E. 617 (1923), the court assumed that provisions of OHIO GEN. CODE § 3781 (1938) (now OHIO REV. CODE ANN. § 723.48 (Page 1953)) authorizing city authorities to recover "by civil action" fines imposed for the violation of ordinances regulating speed of railroad cars within corporate limits prevented the imposition of criminal penalties.

[188] Central Outdoor Advertising Co. v. Evendale, 54 Ohio Op. 354, 124 N.E.2d 189 (C.P. 1954); OHIO REV. CODE ANN. § 715.20 (Page 1953).

[189] Benjamin v. Columbus, 167 Ohio St. 103, 146 N.E.2d 854 (1957), *cert. denied*, 357 U.S. 904 (1958).

[190] 1 Ohio St. 2d 113, 205 N.E.2d 382 (1965).

[191] *See generally*, Note, *Regulation of Door to Door Solicitation by Enactment of a Green River Ordinance: Application and Validity in Ohio*, 32 U. CIN. L. REV. 92 (1963).

[192] *See* Wooster v. Evans, 92 Ohio St. 504, 112 N.E. 1082 (1915); Great Atlantic & Pacific Tea Co. v. Tippecanoe, 85 Ohio St. 120, 96 N.E. 1092 (1911).

ness of the legislation, the court chose to follow the original *Green River* case[193] and the opinion of the Supreme Court of the United States[194] upholding such ordinances as only a limited restriction to protect the privacy of the home.

The court also dealt with the power of the municipality to prohibit or regulate soliciting. As to the former, it reiterated its position that the Home Rule Amendment granted power to municipal corporations of the State to prohibit as well as regulate. Thus it again rejected the opposite conclusion reached by an appeals court in *Frecker v. Dayton*[195] and made amends for the failure of the affirming majority on the supreme court in that case to deal with that issue. The court also strove to make clear that the lawfulness of a business did not create a special basis for different treatment; such a business could be regulated or prohibited like anything else within the limits of the police power, requiring only that a restrictive statute be reasonably directed at furthering the well-being of the community.

Perhaps the most important portion of the decision was the conclusion that sections 715.63 and 715.64 of the OHIO REV. CODE,[196] granting authority to municipalities to regulate peddlers and solicitors with stated exceptions, were not "general laws" within the meaning of the Home Rule Amendment. They were found not to be licensing laws, regulations or prohibitions of conduct. Nor

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[193] Green River v. Fuller Brush Co., 65 F. 2d 112 (10th Cir. 1933).

[194] Breard v. Alexandria, 341 U.S. 622 (1951).

[195] 88 Ohio App. 52, 85 N.E.2d 419 (1949), *aff'd on other grounds*, 153 Ohio St. 14, 90 N.E.2d 851 (1950).

[196] Any municipal corporation may license exhibitors of shows or performances of any kind, hawkers, peddlers . . . and hucksters in the public streets or markets. The municipal corporation may, in granting such license, charge such fee as is reasonable. No municipal corporation may require of the owner of any product of his own raising, or the manufacturer of any article manufactured by him, a license to vend or sell, by himself or his agent, any such article or product. . . .

OHIO REV. CODE ANN. § 715.63 (Page 1953).

Any municipal corporation may license transient dealers, persons who temporarily open stores or places for the sale of goods, wares, or merchandise, and each person who, on the streets or traveling from place to place about such municipal corporation, sells, bargains to sell, or solicits orders for goods, wares, or merchandise by retail. Such license shall be granted as provided by section 715.63 of the Revised Code.

This section does not apply to persons selling by sample only, nor to any agricultural articles or products offered or exposed for sale by the producer.

OHIO REV. CODE ANN. § 715.64 (Page 1953).

did they purport to provide for the government of municipalities. Rather they only purported to grant and limit legislative power:

> The words 'general laws' as set forth in Section 3 of Article XVIII of the Ohio Constitution mean statutes setting forth police, sanitary or other similar regulations and not statutes which purport only to grant or to limit the legislative powers of a municipal corporation to adopt or enforce police, sanitary or other similar regulations.[197]

In clear, unambiguous language the court has reiterated the conclusions of the *Evans* case and has eliminated the restrictive effect of numerous unnecessary power-granting statutes left in the Code from pre-amendment days. It should also be noted that the court failed to adopt a policy conflict approach.

This decision came only after a number of lower court opinions had dealt with peddler and solicitor regulations in an entirely different fashion. Several of these involved the prohibition of the sale from carts and the like in the public streets and parks of the community,[198] while one involved a "Green River" ordinance which was treated as prohibitory in effect.[199] In each, the ordinance was found invalid on the basis of several combinations of conclusions. One conclusion was that the state's licensing of peddlers and its granting of authority to municipal corporations to license them[200] amounted to a recognition of such a business as lawful and served as an implied limitation on the power of the municipality to prohibit it as

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[197] West Jefferson v. Robinson, 1 Ohio St. 2d 113, 118, 205 N.E.2d 382, 386 (1965).

[198] Frecker v. Dayton, 88 Ohio App. 52, 85 N.E.2d 419 (1949), *aff'd on other grounds,* 153 Ohio St. 14, 90 N.E.2d 851 (1950); Schul v. King, 35 Ohio Op. 238, 70 N.E.2d 378 (C.P. 1946); Frecker v. Zanesville, 35 Ohio Op. 234, 72 N.E.2d 477 (C.P. 1946). Only in X-Cel Dairy, Inc. v. Akron, 63 Ohio App. 147, 25 N.E.2d 700 (1939), *appeal dismissed,* 136 Ohio St. 340, 25 N.E.2d 680 (1940), which was based on a sketchy record and incomplete argument, had a court upheld such an ordinance.

[199] Washington v. Thompson, 80 Ohio L. Abs. 598, 160 N.E.2d 568 (C.P. 1949), which also questioned whether an ordinance which prohibited the "practice" of visiting applied at all when only one visit was alleged. The court in Defiance v. Nagel, 108 Ohio App. 119, 159 N.E.2d 791 (1959), invalidated a conviction on the ground that no "practice" had been shown from one visit, but then went on, over the protests of the dissent, to express grave doubts over the validity of the Green River ordinance in view of the exceptions contained in OHIO REV. CODE ANN. §§ 715.63-.64 (Page 1953).

[200] OHIO REV. CODE ANN. §§ 715.61, .63 (Page 1953).

a nuisance.[201] There was also found to be a resulting conflict either with state policy in general[202] or with the exception provided for in the municipal power-granting statute.[203] Finally, in all but the "Green River" ordinance case,[204] the courts also found that to prohibit was unreasonably excessive when regulation would have served the municipal purposes as well.

Reaching the first of these conclusions pays small heed to the fact that merely because a general license is issued by the State does not necessarily mean that specific regulations imposed by municipalities will be in conflict.[205] But Judge Taft in his dissenting opinion to the supreme court decision in *Frecker v. Dayton*[206] mounted a more general attack to refute all of these arguments. He dismissed talk of a lawful business as begging the question as to whether it could be regulated by use of the police power. He found that regulation of street sales of ice cream was sufficiently related to the safety of children to be neither discriminatory nor unreasonable. In addition, without resort to the question of "general laws," he found the statutory provisions did not establish any policy against prohibition or any right in peddlers to use the streets for their business.

Not until the *Robinson* case did the court place the rationale for rejecting these power-granting statutes as limitations upon municipal power, either through implication or through their express exceptions, on the much stronger ground that they were not general laws and were therefore as ineffective as the provision involved in the *Evans* case.

This was not the approach followed by courts in still another group of cases which involved the statutes and ordinances requiring licenses of peddlers and solicitors before they could ply their trade within the corporate limits. Without reference to a possible "general laws" issue, these courts found the failure to include in the licensing ordinances the exceptions provided for in

[201] Frecker v. Dayton, 88 Ohio App. 52, 85 N.E.2d 419 (1949), *aff'd on other grounds*, 153 Ohio St. 14, 90 N.E.2d 85 (1950); Washington v. Thompson, 80 Ohio L. Abs. 598, 160 N.E.2d 568 (C.P. 1949); Schul v. King, 35 Ohio Op. 238, 70 N.E.2d 378 (C.P. 1946); Frecker v. Zanesville, 35 Ohio Op. 234, 72 N.E. 477 (C.P. 1946).

[202] Schul v. King, 35 Ohio Op. 238, 70 N.E.2d 378 (C. P. 1946); Washington v. Thompson, 80 Ohio L. Abs. 598, 160 N.E.2d 568 (C. P. 1949).

[203] *Id.*, and Frecker v. Dayton, 88 Ohio App. 52, 85 N.E.2d 419 (1949), *aff'd on other grounds*, 153 Ohio St. 14, 90 N.E.2d 851 (1950).

[204] Washington v. Thompson, 80 Ohio L. Abs. 598, 160 N.E.2d 568 (C.P. 1949).

[205] *See* Holsman v. Thomas, 112 Ohio St. 397, 147 N.E. 750 (1925).

[206] 153 Ohio St. 14, 21, 90 N.E.2d 851, 854 (1950).

sections 3672 and 3673, OHIO GEN. CODE, or their successor section 715.63 and 715.64, OHIO REV. CODE,[207] resulted either in a conflict in the "head-on collision" sense[208] or in a violation of a prohibition against municipal actions of this nature.[209] In two other cases the courts failed to question these sections in making their findings that to require an identification card of solicitors did not amount to a license in the statutory sense,[210] and that the constitutionality of an ordinance which omitted the statutory exceptions was not called into question when the defendant failed to fit himself within their limits.[211]

Without exception these cases represent an acceptance of power-granting and limiting statutes as valid enactments and at times as determinative of the effectiveness of municipal efforts at regulation. Apparently this could result, even in face of the theory of "general laws" as announced in *Evans* and others, because there was no direct holding as to the validity of these particular statutes by the supreme court until the *Robinson* case. This causes grave misgivings over what effect other needless statutory grants of power have had, both in judicial circles and perhaps more importantly in the offices of municipal administrators.

As was suggested at the outset of this section, the true meaning of the term "general laws" flows naturally from the provisions of the constitution itself. Legislative denial of power is inconsistent with the constitutional grant, and provisions of the "no conflict" clause cannot comfortably lead to any other conclusion. The better considered cases in this area confirm this approach. The most immediate effect of this interpretation is to add to the freedom of municipal corporations from dependency upon legislative enabling acts, and (as to charter municipalities) from state control of matters of self-government—the not inconsequential freedom from direct state interference in the exercise of their broad police powers. It corre-

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[207] See text of exceptions at note 196 *supra.*

[208] Wooster v. Gentile, 116 Ohio App. 386, 188 N.E.2d 172 (1962). In Nickles v. Echelberger, 21 Ohio L. Abs. 679, 31 N.E.2d 474 (Ct. App. 1935), a baker was considered to be a "manufacturer," but as an alternative ground the court found the ordinance discriminatory.

[209] North College Hill v. Woebkenberg, 59 Ohio App. 458, 18 N.E.2d 614 (1938) (dairy company which processed raw milk was considered to be a "manufacturer").

[210] Mogadore v. Coe, 93 Ohio L. Abs. 449, 197 N.E.2d 570 (C.P. 1963).

[211] Ravenna v. Ivec, 95 Ohio L. Abs. 202, 202 N.E.2d 706 (Ct. App. 1963).

spondingly limits the method by which ultimate state supremacy can be exercised in this area to one of affirmative regulation of the conduct of the citizens of the State, for mere silence is also foreclosed as a means to this end.

IV. Effectiveness of Ohio's Conflict Approach

Home Rule, or any other division of power between two levels of government, presupposes that one level is better suited than the other to meet a particular need. In order to test the effectiveness of such a division it is necessary to consider whether the total needs of the people for governmental action are being met at the more appropriate level, with a minimum of friction between levels. Home Rule ought to preserve for the superior body, in this case the state, sufficient power to carry out its necessary functions, while at the same time affording adequate local autonomy to the subordinate units, municipal corporations, for them to meet satisfactorily their varied individual needs. This requires a measure of flexibility in order to permit shifts of emphasis from time to time to reach practical solutions to practical problems. Above all, there needs to be a spirit of accommodation between the two levels as well as with the courts in order to achieve a really workable system.

There can be little doubt that the one policy of the Ohio division is to retain in the state sufficient power to promote the general welfare through the exercise of the police power. Home Rule provisions have released completely from state control only matters of local self-government for charter municipalities, although they have restricted the manner in which the state can exercise its supremacy in the area of police regulations. In fact, rather than fears of diminished state authority, there may be some justified misgivings over the manner in which courts have from time to time sustained the "withdrawal" of certain matters from municipal cognizance because of their being matters of "statewide concern," and the ease with which this has been in part accomplished by the creation of separate agencies under direct state control.

Despite these indications of an extensive residual state power, there is less than complete capability on the part of the state to achieve uniformity of regulation in the police power area because the means of obtaining exclusiveness has been denied it. There can be no denial of power to a municipal corporation; uniformity can be achieved only to the degree to which the state itself regulates. Although there has been some indication of the use of what

amounts to the preemption doctrine, particularly under the "statewide concern" approach, it is neither structurally sound, clearly established, nor properly adapted for extensive use in the context of state-municipal corporation relations. This inability to achieve uniformity directly or completely may tend more and more to be a handicap to the state in its efforts to solve modern problems where diversity may not amount to a virtue.

From the point of view of the municipality, its release from dependency upon the state for enabling acts in order to exercise powers either of local self-government or police remains a clear advantage, as is the reaffirmation of the inability of the state to deny it power. In this connection the continued existence of power-granting statutes in the Code and resort to them as a source of limitation of power is unfortunate. Not only is it bad theory that can lead to erroneous results in litigation, but these power-granting statutes can also serve to stifle imaginative action on the part of municipal administrators to try to solve their own everchanging problems. Until a thorough revision of the Code sorts out what is simply redundant or is a denial of constitutional authority, one can only hope that recent supreme court opinions will have a strong effect in avoiding the potential harm created by this situation.

The municipal police power to prohibit has been moved out from under a temporary shadow to full acceptance again. The *Sokol* "head-on collision" test has, in general, given municipalities as much freedom of action as the language of the Amendment could permit. In its application by the courts, no real distortion is discernable. There has been a reasonable degree of strictness in defining the subject matter of statutes so as to permit latitude for municipal action. This seems particularly true with respect to municipal definition of crimes. Adherence to the approach of permitting stricter municipal regulations and of finding general state licenses to be no bar to specific municipal regulations should also be recalled in this regard. The whole range of penalties is open to municipal authority. However, through the felony-misdemeanor conflict approach and in the general development of conflict by implication, shadows have been cast upon the relatively clear picture of municipal power. They remain shadows because the courts have not yet applied them to the full extent of their restrictive potential. In fact, there are indications that the felony-misdemeanor rule will not be given the broad meaning of conflicts with policy to which it is capable of being put. Even so, these concepts have been

limiting factors on local autonomy, and the full effect which the felony-misdemeanor rule will have upon local law enforcement remains undisclosed.

Inroads by the preemption doctrine would be of even more serious consequence; but the doctrine can hardly be said to have achieved even limited success, although it has been mentioned enough in opinions to give reason for pause before ruling out summarily the possibility of its eventually prevailing.

Flexibility in a power structure is necessary; but it is difficult to achieve and destructive of clear thinking. It feeds upon vagueness, vests great power in an arbiter, and creates potentially disruptive forces. The Ohio situation appears to have elements of all of these attributes. Constitutional divisions of power, if given literal interpretation, often make it difficult to achieve flexibility; but the broadness of the local self-government and police regulation terms, coupled with the "no-conflict" provision, causes the Ohio Constitution itself to permit a considerable degree of flexibility and thereby to lodge in the courts the role of final arbiter of the division of power. This has been both an irritant, because of the uncertainty it creates, and a boon, because it has permitted the courts to shift and countershift in finding municipal actions to be matters of self-government and in allowing the incorporation of new concepts into the conflict test. Unfortunately, it is not clear whether this is the result merely of vagueness of concept or whether it reflects a considered response by the court to felt needs. Without indulging in undue criticism, one might suspect that the former is not entirely absent.[212] Yet in the development of "conflict by implication" in the *Schneiderman* and *Neil House* cases, and to a lesser extent in the felony-misdemeanor conflict approach of the *Betts* case, shifts in the importance of the relevant factors might well explain the results reached.

The presence of this degree of flexibility might well serve to meet the need of the State to achieve uniformity of regulation. It has already provided two important tools in "conflict by implication" and "conflict through differing policies." It is suggested, how-

[212] One author has concluded that initial uncertainties over objectives and inherent classification problems caused by the dynamic nature of Home Rule has until recently made the Ohio experience an unhappy one. Blume, *Municipal Home Rule in Ohio: The New Look*, 11 W. RES. L. REV. 538 (1960). There is no doubt that the criteria for classification are burdensome both because of their relative artificiality and of their number. Yet Home Rule may not be an unmixed blessing in a modern scene that is asking more and more of the state.

ever, that the further potent weapon of preemption continue to be denied the State in this field. Achieving uniformity where needed will have been bought at too high a price if this should be permitted to occur. Denial of municipal regulation, once it is applied, can have a deadening effect upon municipal government. Moreover, preemption can be extended far beyond State needs; and it is often built on the sand of judicial investigation into nonexistent legislative intent.

Perhaps the most important ingredient in the process of power allocation is a spirit of accommodation. This is the heart of the problem. Effective government officials at the state and municipal levels as well as on the bench can, while asserting their authority, impose self-limitation so as not to disrupt unnecessarily the other fellow's business—so as not to create impossible situations which force harsh solutions. There is every indication that a great deal more could be done along this line by all concerned. Naturally the most powerful, the State, provides the most graphic examples of shortcomings, just one of which is the failure to modernize and rectify the obvious defects in the Municipal Code. Intrusion by piecemeal legislation into essentially municipal areas as well as failure to bring about legislative reforms in the broad spectrum of state-municipal relations are further examples. But municipal and judicial officials must also learn better to accomodate. Making a system of government work may well take some of the same kind of "eternal vigilance" spoken of so long ago.